***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,648

DAVID M. WILLIAMS,

*Appellant,*

v.

RAWLINGS TRUCK LINE, INC.
JOHN EDWARD WILLIS

and

HARRY GOLDBERGER,

*Appellees.*

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Appeal From The United States District Court
For The District Of Columbia



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## QUESTIONS PRESENTED

I. Is a motorist liable for making a false or misleading signal or indication which causes, or contributes to the cause of a collision?

II. Where the driver of a motor vehicle makes a signal or indication that he is about to move from a straight course on the highway, is he required in the operation of his vehicle, to anticipate that others on the highway may have seen the signal and that their actions may be affected, and is his right of way under those circumstances qualified by a duty to be on the alert for anyone who may have been affected by the signal, particularly if the signal is not executed, or is the right of way of the motorist unaffected by any signal he may make?

III. Where the owner of a New York registered automobile sells the automobile in New York but in permitting the continued use of his license plates to circumvent insurance laws, remains liable in New York as the owner, is he also liable as the owner in the District of Columbia for injuries occurring here?

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## BRIEF FOR APPELLANT

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### JURISDICTIONAL STATEMENT

This is an action for personal injuries against Rawlings Truck Line, Inc., and John Edward Willis, the owner and operator, respectively, of a truck; and Harry Goldberger, the alleged owner of the automobile in which the plaintiff was a passenger when the two vehicles collided. The jurisdiction of the District Court below was founded upon the amount of controversy being in excess of $10,000.00. The collision occurred in the

District of Columbia. The trial court directed a verdict in favor of defendant Goldberger, the alleged owner of the automobile, and submitted the issue of negligence as to the owner and operator of the truck to the jury. The jury returned a defendant's verdict on January 27, 1964. The plaintiff, David Williams, appeals from the order directing a verdict in favor of Harry Goldberger and from the order entered on the verdict in favor of the defendants, Rawlings Truck Line, Inc., and John Edward Willis. Appeal was noted February 24, 1964.

## STATEMENT OF THE CASE

This action arises out of a collision between an auto making a left turn and an on-coming truck which had been signalling an intention to make a right turn as it approached an intersection. The truck, instead of executing the right turn at the intersection, continued straight ahead into the side of the auto as it was completing the turn. The auto, in executing the left turn had crossed three lanes on the opposite side of the road and the front of the automobile was partly in the driveway of the gasoline station when it was struck in the center by the right front of the truck which had been proceeding in the curb lane. The point of impact on the street was fixed at three feet from the curb. Plaintiff, a passenger in the auto, sues the owner of both vehicles and the driver of the truck.[1] The essential testimony relating to liability is summarized as follows:

On Sunday, June 1, 1958, the plaintiff was a passenger in an automobile bearing New York license plates, operated by one Joseph Rivera, en route from New York to the Marine Corps base at Camp Lejeune,

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[1] The automobile driver could not be found either as a defendant or a witness. See Plaintiff's Motion (Filed December 28, 1960) to certify to ready calendar, citing year's delay caused by defendants' attempt to implead Rivera (the other operator) and Rawling's and Sam Willis' Opposition Thereto, Filed January 4, 1960, citing their continuing attempts to locate Rivera.

North Carolina. As the automobile was proceeding west into the city along New York Avenue in N.E. Washington, D.C., it stopped in the lane nearest the center of the road, preparatory to making a left turn into a gasoline filling station. The gasoline station is on the southeast corner of a "T" intersection with New York Avenue. Sixteenth Street is the vertical portion of the "T" and New York Avenue the horizontal portion of it. The automobile stopped on New York Avenue preparatory to making the turn a short distance before the intersection with Sixteenth Street and waited until there was a break in the traffic (J.A. 27). The plaintiff was seated in the middle of the front seat between the driver on his left and Joseph Purcell on his right. It was night time and raining.

The essential evidence in the case on the circumstances of the collision was given through testimony of the plaintiff; his fellow passenger on his right in the front seat, Joseph Purcell; the investigating police officer; and Mr. Willis, the truck driver, called as an adverse witness.

According to the witness, Joseph Purcell, (J.A. 63, *et seq.*) he was seated on the right front seat of the auto as it had stopped for a minute or two, preparatory to making a left turn into the filling station There was a break in traffic, and he observed the truck owned and operated by the defendants approaching from the opposite direction on New York Avenue in the curb lane. He could see cars 200 feet away (J.A. 70) and there was no obstruction to his vision. The windshield was clear (J.A. 70). The truck was first observed 100 feet on the far side of the intersection. The truck was in the right hand, or curb, lane, making a flashing yellow light on the right front fender. There were no parked vehicles on or near the road over which the truck was travelling as it approached the point of collision and no cars were swerving or turning one way or the other (J.A. 70). He observed the truck as it traversed 100 feet from that point to the beginning of the intersection and noticed that the blinker remained on and the vehicle was slowing

down (J.A. 64). The front wheels of the truck had begun to turn.[2] While the car in which he was a passenger was turning across New York Avenue towards the gasoline station, he looked for a split second towards the gasoline station, then he looked up and saw on his right the same truck, bearing down directly towards the automobile, about 10 to 15 feet away and the yellow signal on the right front fender of the truck was still blinking in clear view at his eye-level. He had time only for an exclamation before the vehicles collided. He was asked on direct examination whether the vehicles would have collided based upon his judgment of their respective speeds and distances when he first looked away from the truck and objection to this question was sustained (J.A. 71).

Witness Purcell further testified that almost before the vehicles had come to a halt following the collision, the operator, Joseph Rivera, leaped out of the automobile and screamed at the defendant Willis, operator of the truck, "I saw your blinker; I saw your blinker. Why didn't you make the turn?" (J.A. 64). The defendants, owner and operator of the truck, objected to this testimony, and were sustained. The plaintiff pressed the exclamation of Joseph Rivera under the *res gestae* doctrine and made a proffer that Joseph Rivera was excited; that it occurred immediately within seconds following the collision and was an excited utterance made in the presence of the defendant. The Court excluded that evidence without explanation (J.A. 66).

The police officer described the road upon which the collision occurred as having three lanes of 10-1/2 feet each, for out-bound traffic (the direction in which the truck was travelling) and two lanes for in-bound traffic (J.A. 30-31). He fixed the point of collision as three feet from the curb (J.A. 31) and the front part of the automobile partly on the driveway of the gasoline station at the time of collision (J.A. 35), the automobile

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[2] "[Witness Purcell] As he approached the corner, it appeared to me he was slowing down and his wheels were starting to turn; and we were about halfway through our turn and I had looked ahead towards the gas station and when I turned back, I would say the truck was about 10 to 15 feet from us and I screamed . . ." (J.A. 64)

having been struck in the center by the right front portion of the truck (J.A. 34) as depicted by photographs admitted in evidence (J.A. 34-35). The officer testified that he interrogated the two drivers at the scene in the presence of each other. Defendant objected to the testimony by the police officer of the statement given by the automobile driver, Rivera, at the scene in the presence of the defendant truck driver, and was sustained (J.A. 32). As a result, the only statement of the drivers made at the scene and admitted in evidence was that of the truck driver, who stated that he had passed a truck, and his right turn signal was on to come back to the curb lane, and when about 15 feet away, the Mercury made a left turn in front of the truck (J.A. 32).[3]

According to the defendant Willis, who was called as an adverse witness, he began his trip from Emporia, Virginia, at 4:30 that afternoon. The truck was in good operating condition, without defects. He stopped at Fredericksburg at about 7:00 or 7:30 p.m. for about 10 minutes and made a telephone call. He made no other stops from Emporia to the point of the accident, except for traffic. As he approached the point of the accident, he was familiar with the cafeteria in the block preceding the point of the accident. He stated he had already had dinner (a sandwich) at Fredericksburg (J.A. 70) although on a deposition given in 1960, he stated he had nothing to eat or drink from the time he left the house until the time of the accident (J.A. 47). He denied that he intended to make a right turn at or near the intersection near the accident (J.A. 41). When he was asked whether he ever stopped at this cafeteria before, the trial court ruled the question immaterial (J.A. 41).

As he proceeded along New York Avenue towards the point of the collision, he stated that he pulled out to the left hand lane to pass a

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[3] [Officer Nairn] "The operator of the truck stated that he was going east on New York Avenue, that he had passed a truck that was parked just west of the intersection of 16th Street, that he passed the truck and he had his right turn signal on to come back into the curb lane. When he was about 15 feet away, this Mercury made a left turn in front of him and the collision occurred."

vehicle and turned off his signal after he got back in the right hand lane; that he was not long in the right hand lane before the collision. He was straight for a short time – two or three minutes; that it was a quarter block from the point where he completed his passing to the point of the accident (J.A. 42). On his deposition, he said it was between a quarter mile and a half mile between the time he turned his right turn signal off and the point of collision (J.A. 43).

He testified that he never saw the automobile pass from the center of the road to the point of collision (J.A. 44) and that he was 15 feet away from it when he saw it for the first time. On the deposition given in 1960, he stated it was 10 to 15 feet (J.A. 44) at that time. He drew a diagram on the blackboard,[4] showing that the automobile was entirely in his line of traffic when he saw it for the first time. He further testified that as he was proceeding down the highway, he was in the right hand lane, and there was no traffic in front for at least 75 feet and the car that was 75 feet from him was in the right hand lane (J.A. 45); that there was another vehicle further ahead in the lane to the left still going in his direction (J.A. 45); that when he first saw the Mercury it had its headlights on (J.A. 45). He stated that the speed of the *Mercury* when he first saw it was between 5 to 10 miles an hour and then stated that *his* speed was between 5 to 10 miles an hour at that time; that he was travelling 20 to 25 miles an hour as he approached the corner nearest the collision, and he saw "this car coming across the way and . . . slowed up some." (J.A. 48) Whether he could have been slowing down as he approached the intersection as stated by the witness Purcell, was ruled an improper question (J.A. 49).

He was asked for an explanation by plaintiff's attorney as to why he didn't see the automobile as it crossed from the center line of the road to the point where he first saw it and stated he didn't see it because

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[4] A life-size photographic reproduction of the blackboard was filed with the record on appeal.

he looked back through the rear view and "looks on the side and when it rains you look low on the road" (J.A. 59). He stated he was observing a considerable distance ahead (J.A. 59); that he was sitting higher than an automobile and could see 200 feet ahead but was not observing the road 200 feet ahead, but rather 30 to 35 feet (J.A. 59), and then stated he was observing the next 40 feet immediately after the first 35 feet in front (J.A. 60).

When he was recalled by defense counsel, he stated it was raining hard (J.A. 92). On cross-examination, he admitted that on his deposition given in 1960, he was asked, "Could you give . . . any reason why you didn't see the automobile before you did?" and his answer was "No." (J.A. 93)

As to the defendant Goldberger, the plaintiff offered his affidavit given by Goldberger in support of the motion for summary judgment which had been over-ruled by the Motions Court, but offered only those portions of the affidavit sufficient to show that the automobile was registered under New York law in the name of the defendant Goldberger and that the registration was continued in the name of the defendant Goldberger with his permission because Joseph Rivera, although purchasing the automobile, was unable to secure liability insurance (J.A. 77, 81). The trial court indicated that it would allow in evidence the affidavit of defendant Goldberger but required the introduction of other portions and excluded the reference to insurance (J.A. 81).

The plaintiff offered in evidence the Traffic & Motor Vehicle Regulations then in effect in the District of Columbia, the necessity of formal proof having been waived at pre-trial. All of those sections of the Traffic & Motor Vehicle Regulations which defined the turn signal[5] and prescribed its use[6] were excluded. It also excluded that section requiring an operator

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[5] §§40(a); 132(b)

[6] §39(b)

"to give his full time and attention to the operation . . ."[7] as well as that provision defining reckless driving as operation "without due caution and circumspection . . . and in a . . . manner so as to endanger [etc.]"[8] and that section requiring that "In every event speed shall be so controlled as may be necessary to avoid colliding . . ."[9]

The main theory of the plaintiff's case was submitted upon the following prayer:

> "The right of way of any motorist is not absolute. Where he makes a signal or indication that he is about to move from a straight course upon the highway, he must, in the operation of his vehicle, consider that others on or near the highway may have seen the signal and that their actions may be affected. His right of way under those circumstances is qualified by a duty to be on the alert for anyone who may have been affected by the signal so given, particularly if the signal, having been given, is not executed; and to so control his vehicle or give warning, or both, so as to avoid colliding, in accordance with his duty to use reasonable care under the circumstances."

The court refused to instruct the jury in accordance with this prayer (J.A. 98), and told the jury that "The party having the right of way has the right to assume that the other party will comply with the law and yield to him . . . " (J.A. 109). The court made no reference directly or indirectly in its charge to the jury to the turn signal made by the truck or upon the relevance of this signal in their consideration and refused to submit to the jury any of those sections of the Traffic Regulations relating to the turn signal. After the jury retired, it sent a note asking the trial court for "pertinent traffic regulations" and "pictures in evidence." The Court prepared and sent to the jury room, (J.A. 116)

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[7] §99(c)

[8] §21(a)

[9] §22(a)

See this Brief, infra, pp. 9-12 for traffic regulations with annotations showing references to Joint Appendix where offered in evidence and action of the Court.

in typewritten form, those sections of the Traffic Regulations admitted in evidence requiring the driver of every vehicle to drive at an appropriately reduced speed when special hazard exists (§22c); prohibiting a vehicle from turning unless the turn could be made with reasonable safety and without giving an appropriate signal (§39a); requiring the turning driver to yield to approaching traffic (§47b); and that section requiring that an operator give warning by blowing a horn where appropriate (§143a). Thereafter, the jury returned its verdict in favor of the defendants, Rawlings Truck Lines, Inc., and John Edward Willis (J.A. 116).

## STATEMENT OF POINTS

I. With respect to the appellees, Rawlings Truck Line, Inc., and John Edward Willis: The trial court erred in failing to submit to the jury the evidence, the traffic regulations and the law applicable to the plaintiff's theory of the case.

II. With respect to the appellee, Harry Goldberg: The trial court erred in directing a verdict in favor of the appellee, Goldberger.

## TRAFFIC AND MOTOR VEHICLE REGULATIONS INVOLVED

### PART I

*Offered in Evidence but Rejected by the Court with Respect to the Defendants, Truck Driver and Trucking Company.*

**Sec. 21. Reckless Driving**

**(a)** Any person who drives any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving. (Title 40, Sec. 605. (b), 1951 D.C. Code.) (C.O. No. 57-1086)

Offered by the Plaintiff and admitted as to the defendant Goldberger only. (J.A. 51)

**Sec. 22. Speed Restrictions**

**(a)** No person shall drive a vehicle on a street or highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the street or highway in compliance with legal requirements and the duty of all persons to use due care.

Offered by the plaintiff; objections sustained. (J.A. 51)

Offered again; objection sustained. (J.A. 84)

**Sec. 39. Turning Movements and Required Signals**

**(b)** A signal of intention to turn right or left when required shall be given continuously during not less than the last 100 feet traveled by the vehicle before turning.

Offered by the plaintiff; objection sustained. (J.A. 53)

**Sec. 40. Signal by Hand and Arm or Signal Device**

**(a)** Any stop or turn signal when required herein shall be given either by means of the hand and arm or by a signal lamp or lamps or mechanical signal device, except as otherwise provided in paragraph (b).

Offered by the plaintiff; objection sustained. (J.A. 54)

**Sec. 99. Obstruction to Driver's View or Driving Mechanism**

**(c)** An operator shall, when operating a vehicle, give his full time and attention to the operation of the same.

Offered by the plaintiff; objection sustained. (J.A. 55)

Offered again by plaintiff; objection sustained. (J.A. 85)

**Sec. 132. Signal Lamps and Signal Devices**

**(b)** Any motor vehicle may be equipped and when required by these regulations shall be equipped with lamps showing to the front and rear for the purpose of indicating an intention to turn either to the right or left. When lamps are used for such purposes, the lamps showing to the front shall be located on the same level and as widely spaced laterally as practicable and when in use shall display a white or amber light, or any shade of color between white and amber, visible from a distance of not less than 100 feet to the front in normal sunlight, and the lamps showing to the rear shall be located at the same level and as widely spaced laterally as

Offered by plaintiff; objection sustained. (J.A. 56)

practicable and when in use shall display a red or amber light, or any shade of color between red and amber, visible from a distance of not less than 100 feet to the rear in normal sunlight. When actuated, such lamps shall indicate the intended direction of turning by flashing the light showing to the front and rear on the side toward which the turn is made. (C.O. No. 58-497)

**Sec. 146. Windshields Must Be Unobstructed and Equipped with Wipers**

**(c)** Every windshield wiper shall be maintained in good working order.

Offered by plaintiff; objection sustained. (J.A. 85)

**(d)** No motor vehicle shall be operated when the windshield is so cracked, scarred, clouded, or otherwise defective, as to obstruct vision.

Offered by plaintiff; objection sustained. (J.A. 58)

## PART II

*Received in Evidence*

**Sec. 22. Speed Restrictions**

**(c)** The driver of every vehicle shall, consistent with the requirements of (a), drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.

Admitted as to both defendants. (J.A. 58)

**Sec. 39. Turning Movements and Required Signals**

**(a)** No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in Section 36, or turn a vehicle to enter a private road or driveway or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety. No person shall so turn any vehicle without giving an appropriate signal in the manner hereinafter provided in the event any other traffic may be affected by such movement.

Offered by the plaintiff; admitted as to defendant Goldberger only. (J.A. 53)

Offered by the defendant trucking lines and admitted without objection. (J.A. 95)

**Sec. 47. Vehicle Turning Left at or Between Intersections**

**(b)** The driver of a vehicle intending to leave a public highway by turning left between intersections shall yield to any vehicle approaching from the opposite direction which is so close as to constitute an immediate hazard, but said driver having so yielded and having given a signal as required by law, may make such left turn and other vehicles approaching from said opposite direction shall yield to the driver making such a left turn.

Offered by the plaintiff; admitted to defendant Goldberger only. (J.A. 55)

Offered by plaintiff again against defendant Rawlings; objection sustained. (J.A. 84)

Offered by defendant Rawlings and admitted. (J.A. 95)

**Sec. 143. Horns and Warning Devices**

**(a)**. Every motor vehicle when operated upon a highway shall be equipped with a horn in good working order and capable of emitting sound audible under normal conditions from a distance of not less than 200 feet, but no horn or other warning device shall emit an unreasonably loud or harsh sound or a whistle. The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn but shall not otherwise use such horn when upon a highway. (C.O. No. 56-2045)

Offered by plaintiff; objection sustained. (J.A. 57)

Offered again by plaintiff and admitted. (J.A. 85)

## STATUTE INVOLVED

Whenever any motor vehicle, after the passage of this chapter, shall be operated upon the public highways of the District of Columbia by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall, in case of accident, be deemed to be the agent of the owner of such motor vehicle and the proof of the ownership of said motor vehicle shall be *prima facie* evidence that such person operated said motor vehicle with the consent of the owner. § 40-424, District of Columbia Code, 1961 Ed.

## SUMMARY OF THE ARGUMENT

### I. With Respect to the Defendants, Rawlings Truck Line, Inc., and John Edward Willis:

The principal issue in this case was the negligence arising out of a false, or misleading turn signal made by the truck. The truck company and driver's negligence arising from his signal was two-fold:

*First*, it induced the driver of the automobile waiting to make a turn, to begin that turn in reliance on the truck's indication to turn right at the intersection immediately before the point of collision.

*Second*, the truck driver, having made a false or misleading signal, had qualified or waived his right of way to the extent that he was under a duty to consider that others on or near the highway may have seen the signal and that their actions may be affected, and to control his vehicle, or give warning, so as to avoid a collision. This is in direct contradiction and a direct denial of his right under those circumstances to assume that his right of way would be respected.

These two principal issues were not fairly submitted to the jury on the facts, the applicable traffic regulations, and the law in that the court refused to allow the automobile operator's *res gestae* statement which showed conclusively that he turned in reliance on the truck's signal. The court further excluded all of the traffic regulations offered by the plaintiff which defined the turn signal, its meaning, and when it was to be given. These regulations were necessary that the jury may appreciate the legal significance of those signals. And, finally, the court refused and failed to instruct the jury on the legal significance of the turn signals, and refused to instruct the jury on the principal issue hereinabove stated. In addition to denying instruction on the issue, the court instructed in direct contradiction by stating that the favored motorist had the right to assume his right of way would be respected.

As a result of the court's failure or refusal in these respects, the principal issues in the case on behalf of the plaintiff were never fairly brought before the jury.

## II. With Respect to the Defendant Goldberger:

The defendant Goldberger was, under the law of New York, the owner of the automobile because the automobile was registered in New York and the purported contract of sale to the operator was made and performed in New York, so the law of New York applies to the determination of ownership.

For the purpose of determining the owner of a motor vehicle under the statute of the District of Columbia, imposing liability upon an owner for negligent operation, the law of New York should have been applied. Under the law of New York, it is clear that Goldberger was the owner because he continued to allow the use of his license plates on the automobile to circumvent the insurance laws of New York. This is admitted by the appellee.

In addition, the automobile was being operated in the District of Columbia as the result of the comity of the District of Columbia, in recognition of the laws of New York, which allow the operation of that motor vehicle bearing New York license plates. Since New York law with respect to the right to operate was being applied by comity of the District of Columbia, the interpretation of the New York courts to that law should be binding and the District of Columbia courts should give full faith and credit to that law as interpreted.

## ARGUMENT

### I. THE TRIAL COURT ERRED IN FAILING TO SUBMIT TO THE JURY THE EVIDENCE, THE TRAFFIC REGULATIONS AND THE LAW APPLICABLE TO THE PLAINTIFF'S THEORY OF THE CASE

There was evidence, had it been received, from which the jury could have concluded that the truck driver was negligent in two respects: First, in giving a false or misleading turn signal; Secondly, in failing to observe the turning automobile as it crossed most of the way across New York Avenue. The trial court completely eliminated from the case any issue of negligence arising out of the giving of a false or misleading signal. This was done by excluding traffic regulations relating to the giving of these signals[10] and by refusing to instruct the jury that the false or misleading signal could in any way be a factor in the accident[11] and by further instructing the jury, notwithstanding the misleading signal, that the truck driver had the right to presume that the automobile would yield the right of way to the oncoming truck[12] (in spite of the fact that the truck was giving signal of intention to make a right turn away from the automobile). The trial court's ruling on the

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[10] Traffic and Motor Vehicle Regulations: §39b (Signal of intention to turn required during last 100 feet before turning); §40a (Turn signal shall be given by hand or mechanical signal device); §132 (Motor vehicle may be equipped with signal lights which indicate the direction of turning when actuated).

[11] PLAINTIFF'S PRAYER NO. 2 (Rejected by the Court at J.A. 98):
"The right of way of any motorist is not absolute. Where he makes a signal or indication that he is about to move from a straight course upon the highway, he must, in the operation of his vehicle, consider that others on or near the highway may have seen the signal and that their actions may be affected. His right of way under those circumstances is qualified by a duty to be on the alert for anyone who may have been affected by the signal so given, particularly if the signal, having been given, is not executed; and to so control his vehicle or give warning, or both, so as to avoid colliding, in accordance with his duty to use reasonble care under the circumstances." (J.A. 122)

[12] (The Court, (J.A. 109)) "You are further instructed that the party having the right of way has the right to assume that the other party will comply with the law and yield to him, but the fact he has a technical right of way does not excuse him from exercising ordinary care to avoid injuries to others."

evidence[13] and its instructions to the jury[14] are entirely consistent with but one conclusion, and that is, that regardless of any signal made by the truck, whether made erroneously or made purposefully with a later change of mind, it was entirely immaterial to the issue of the truck driver's negligence. It is significant that the jury asked for the traffic regulations in writing, and labored for several hours with them before reaching a decision.[15] It, therefore, becomes doubly important that for the most part the traffic regulations admitted were those relating to the defendant's theory of the case for the Court had systematically excluded every traffic regulation which bore in any way upon the meaning or significance of a right-turn signal.[16] After reading in the jury room only the regulations admitted, and in view of the Court's silence on the significance of the turn signal, and the Court's charge that what observation he should make the law does not regulate in detail, and the further instruction that the driver could presume his right of way would be inviolate, it seemed that the jury had no conscientious alternative but to decide this point in favor of the defendant. The second point to be submitted to the jury was whether the truck driver looked with effect. The Court apparently made it clear to the jury that where one has the duty

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13 The Court excluded traffic regulations pertaining to the turn signal and excluded relevant evidence in the form of Rivera's res gestae statement, confirming his turning in reliance on the truck's turn signal.

14 Treated infra p. 23.

15 The jury began deliberations at 12:23 p.m. Just before the verdict was received, the Court advised counsel that the jury, shortly after luncheon, sent a note to the Court, requesting "pictures and pertinent traffic regulations," and in response, the Court had §§22c, 39a, 47b, and 143a, typewritten and sent to the jury with the photographs. (J.A. 115)

16 Traffic and Motor Vehicle Regulations §§39(b), 40(a), 132(b).

to look, he must look with effect,[17] but when one reads the entire instructions in the light of the Traffic and Motor Vehicle Regulations admitted, and particularly the denial of the plaintiff's main theory relating to the misleading signal (J.A. 98), the jury could, and probably did, quite reasonably and logically conclude that, while a person who looks must be required to see, there was as to the truck driver no duty to look beyond the 30 to 35 feet that he admittedly only observed.[18]

The theory of the plaintiff as it relates to the turn signal was not a specious or a fanciful one. There was substantial and credible evidence that the truck driver was, in fact, making a flashing, yellow turn signal,[19] which was on his right front fender, in plain view of the truck driver himself,[20] as well as the driver of the automobile and its passengers. The policeman made a point of interrogating the truck driver as to why his turn signal was on and the truck driver did not deny that his turn signal was on, but explained it, saying he had passed a parked vehicle.

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[17] (J.A. 109). The Court's language is in terms of "One who has the duty to look" must see. The Court had rejected (J.A. 99) the following Plaintiff's Prayer taken from Baber v. Akers Motor Lines, 1954, 94 U.S. App. D.C. 211: "If a motorist's failure to have knowledge is due to his negligence, in other words, if a motorist fails to keep a proper lookout and had he kept a proper lookout he would have seen the situation, then he is responsible to the same extent as if he had actually seen. So, if a witness testifies that he looked and didn't see, and you are satisfied from the evidence that had he looked he would have seen, then you may infer that he did not look." The requested Prayer No. 3 predicates negligence on the negligent failure to have knowledge as distinguished from the failure to see where one has the duty to look.

[18] (Cross-examination of truck driver, Willis)
"Q. Were you observing the road ahead of you for a distance of 200 feet?
A. No, sir.
Q. What portion of the road were you observing at the time, in feet?
A. I would say 30 to 35 feet.
Q. You were observing only 30 to 35 feet ahead of you?
A. That is correct." (J.A. 59)

[19] According to Officer Nairn, the driver stated ". . . he had passed the truck and he had his right turn signal on to come back into the curb lane. When he was about 15 feet away . . . ." (J.A. 32)

[20] (Defendant truck driver as an adverse witness, J.A. 39)
"Q. When you are driving your vehicle, if the light is on, either one of the turn signals is on while you are operating the vehicle, can you see the lights from your driver's position? A. Yes, sir."

The witness Purcell, who observed the truck as it approached the intersection, did not see the truck pass any vehicle for there was none to be passed as the truck was in the right lane as he observed it during the 100 feet of travel before the intersection. The jury, therefore, had before it, in addition to the plaintiff's testimony, (from which it could find that the truck driver was making a right-turn signal which he failed to execute) the testimony of witness Joseph Purcell, the testimony of the police officer, and the conflicting statements given by the defendant truck driver.[21] In addition to the turn signal, we have the further evidence that the truck was actually slowing down as it approached the intersection of 16th Street (JA. 64), and that the front wheels of the cab had begun to turn. In addition, we have the *res gestae* statement of the automobile operator made in the presence of the defendant truck driver and made under all of the classic circumstances of *res gestae*. The statement of Rivera is clearly admissible evidence as it falls fully within the three elements required in order to qualify as an excited utterance or spontaneous declaration.[22] The exclusion of this evidence can be

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[21] That his signal was on as he had just passed another vehicle (see note 3, supra); that he turned his signal off a half mile to a quarter mile away (J.A. 43); that he turned it off a quarter block from the collision (J.A. 42).

[22] "These are (a) an exciting event, (b) an utterance prompted by the exciting event without time to reflect, i.e., dominated by the nervous excitement of the event, and (c) the utterance must explain or illuminate the exciting event." Murphy Auto Parts v. Ball, 101 U.S. App. D.C. 416. This Court stated in Murphy Auto Parts: "As Wigmore points out, this third element has been erroneously carried over from the verbal act doctrine." VI Wigmore, Evidence, (3d Ed.) §1752, 1754 (1940); Murphy Auto Parts v. Ball, 101 U.S. App. D.C. 416, 419 n. 13, 249 F. 2d 508.

Wigmore also points out that utterances accompanying an act which explains the act is separately admissible under the doctrine of "verbal acts" as follows: "In these, and countless other instances, the uttered words are a verbal part of the act. Without the words, the act as a whole may be incomplete; and, until the words are taken into consideration, the desired significance cannot be attributed to the wordless conduct.

"Thus the words are used in no sense testimonially, i.e., as assertions to evidence the truth of a fact asserted in them. On the one hand, therefore, the Hearsay rule interposes no objection to the use of such utterances, because they are not offered as assertions (ante, §1766). On the other hand, so far as they may contain assertions, these are not to be used or argued about testimonially, nor believed by the jury; for this would be to use them in violation of the Hearsay rule. In short,

(Cont'd. on p. 19)

understood only as consistent with the exclusion of the law and traffic regulations bearing upon the turn signal and the Court's own belief that the turn signal of the truck was of no legal significance. That the Court entertained this belief is also apparent from the expression of the Court to the jury, when it reported its verdict for the defendant, that in the Court's opinion the accident was entirely caused by the automobile's negligence (J.A. 116). The *res gestae* statement of Rivera, together with the ordinary inferences to be drawn from the manner in which the automobile began its turn as the truck slowed down toward the intersection, compels one to the only reasonable conclusion and that is that the automobile operator saw and relied upon the right turn signal of the truck.[23] While this latter evidence of Rivera, the automobile operator, was not indispensable to the plaintiff's theory, it did go one step further in showing the reliance on the turn signal, but reliance was not as it has been said indispensable to plaintiff's case, for the plaintiff contends that the truck driver having made a right turn signal under circumstances where he should have known it, was required in the operation of his truck beyond

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22 (Cont'd.)
the utterances enter irrespective of the truth of any assertion they may contain; and they neither profit nor suffer by virtue thereof. For example, when an act of adverse possession is to be proved as the foundation of title, and the adverseness consists in a claim of ownership, the occupier's statement, 'This land is mine; for I have a deed from Doe.' is admissible as giving his occupation the significance of an adverse claim, but not as evidence that he has, as asserted, a deed from Doe." Wigmore on Evidence, § 1772.

23 What the passengers saw, the operator could see. Capital Transit Co. v. Garcia, 90 U.S. App. D.C. 168, 194 F. 2d 162, where the court stated that the jury might reasonably infer that the operator of a vehicle could see what the passengers saw.

Prosser points out that "A great many of the common and familiar forms of negligent conduct, resulting in invasions of tangible interests of person or property, are in their essence nothing more than misrepresentation, from a misleading signal by a driver of an automobile about to make a turn, or an assurance that a danger does not exist, to false statements . . . ." Prosser on Torts, (2d Ed. 1955), p. 520.

A motorist negligently giving signal to another that the way is clear and that he could proceed safely is liable therefor. Shirley Cloak & Dress Co. v. Arnold, 1956, 92 Ga. App. 885, 90 S.E. 2d 622; Thelen v. Spillman, 1957, 251 Minn. 89, 86 N.W. 2d 700, 77 ALR 2d 1315; Haralson v. Jones Truck Lines, 1954, 233 Ark. 813, 270 S.W. 2d 892, 48 ALR 2d 248; Petroleum Carrier Corp. v. Carter, 5 Cir. 1956, 223 F. 2d 40 402; Armstead v. Holbert, 1961, ___ W. Va. ___, 122 S.E. 2d 43. Cf. Sweet v. Ringwelski, 1961, 362 Mich. 138, 106 N.W. 2d 742 (motioning child to cross); Miller v. Watkins, Mo. 1962, 355 S.W. 2d 1 (waiving truck driver on to pass bus).

that point, to take into consideration that others in or about the highway may have seen the signal and, having seen the signal, may act in whole or in part in reliance of it.[24]

The right to assume that another motorist will respect one's right of way or will not violate traffic regulations has been held by all of the cases and authorities dealing with the subject to be applicable only where there are no circumstances indicating otherwise and this right to assume, wherever it has been announced, has always been carefully qualified by such language as "In the absence of any circumstances imposing such a duty,"[25] and it has been held that a motorist ". . . is required to anticipate occasional negligence which is to be expected as an incident of highway traffic."[26] Prosser points out that "There are many situations in which the hypothetical reasonable man would be expected to anticipate and guard against the conduct of others.[27]

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[24] This was the principal issue pressed by the plaintiff against the truck company and truck driver and was not a theory which sprung belatedly out of the mind of counsel during or after trial as may be seen by the following portion of the pre-trial order as written by the pre-trial Examiner: ". . . failure to give warning of his change of mind as to his intention to make a right turn by either blinking his lights, blowing his horn, or slowing his vehicle; failure to proceed with great caution under the circumstances knowing (or should have known) that he had given a right turn signal which he did not execute and that others in or about the road would be mislead[ed] by that signal and might rely thereon; failure to yield the right of way after yielding that right of way by indicating the intention to make a right turn; leaving a right turn signal on (in the alternative) with no intention of executing the turn;" (J.A. 13-14).

[25] 60 C.J.S. Motor Vehicles, §249; 7 Am. Jr. 2d Automobiles and Highway Traffic, §356.

[26] 1 Blashfield Encyc. of Auto Law and Practice, (Perm. Ed., 1948) §650. A motorist under certain conditions may be required to anticipate and provide against the occasional negligence which is one of the expectable incidents of highway traffic. Emerson v. Bailey, 102 N.H. 360, 156 A. 2d 762.

[27] Prosser on Torts, (2d Ed., 1955) p. 138; A motorist is required "to guard against that occasional negligence which is one of the ordinary incidents of human life and, therefore, to be anticipated." Restatement of Torts, §302, comment l.

This right to assume the right of way is further limited by the authorities to those motorists who are not themselves contributing to a hazardous situation by their own misconduct, as it has been said, a motorist who is not himself driving carefully is not entitled to invoke this rule[28] and it has been held that whether a favored driver in approaching an intersection in an unlawful manner had forfeited his right of way was for the jury.[29]

The truck driver, having made the signal, did not thereafter have any right to assume absolutely that the right of way which he otherwise would have had, would continue to be inviolate for he had waived his right of way[30] and his right of way beyond that point was qualified by a duty to anticipate that another motorist waiting to make a turn might commence it.[31] The jury had sufficient evidence that the truck driver as it approached 16th Street saw or should have seen the automobile

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[28] Moreno v. Hawbaker, 321 P. 2d 538, 157 Cal. App. 2d 627; Smith v. American Oil Co., 49 S.E. 2d 90, 77 Ga. App. 463; 1 Blashfield Encyc. of Auto Law & Practice, §650 (and pocket part).

[29] 61 C.J.S. Motor Vehicles, §526, p. 461 and cases cited therein.

[30] See McKnight v. Bradshaw (Mun. Ct. App.) 90 A. 2d 825, where the plaintiff appeared to be turning his vehicle to the right, but it appeared that the plaintiff changed his mind at the last moment and decided to go straight. This was held to be sufficient evidence of plaintiff's negligence contibuting to the collision notwithstanding his right of way and so demonstrates the point that notwithstanding the right of the favored driver, he may be negligent in giving false or misleading signals.

[31] McKnight v. Bradshaw, supra.
The purpose of the statute requiring operators to give the signal of intention to turn is to prevent collisions as the result of changes in direction without warning so that its benefits in the absence of express limitation extend to any persons who may be injured by such collisions, including passengers. Sullivan v. LeBlanc, 100 N.H. 311, 125 A. 2d 652; and a motorist having signalled a left turn who changed his mind and swerved back to his right was bound to make known his change of intentions and obliged to use ordinary care to give a statutory signal before turning back to the right. McCoy v. Carter,(1959) ___ Ky. ___, 16 Auto Cases 2d. 603.

beginning to make a left turn[32] and that the truck driver saw or should have seen that there was a break in the traffic in which he was proceeding and that there was such a circumstance which might impel the automobile to commence the turn.

In the busy highway conditions in which we operate today, the turn signals are not made as a matter of courtesy and safety alone, but in order to expedite the flow of traffic. It may seem to us with the excellent vision of hindsight foolhardy on the part of the operator to have begun a left turn when there was an oncoming truck but we should not, in passing upon that conduct, forget all of the traffic conditions that must have existed on that evening. The traffic on New York Avenue is busy and nearly continuous at almost any time of day. The automobile operator had stopped, yielded the right of way, and waited for a break in traffic.[33] Under the best of conditions, he would not have had too much time to cross New York Avenue and with an approaching truck slowing down and making a turn signal this must have appeared to him, in the second or two in which he had to reflect, as good a time as any to make the turn. We are not attempting to defend as entirely free of any negligence the actions of the automobile operator, but to emphasize the point that his conduct was not so unreasonable as to have been entirely unanticipated by the operator of the truck in view of his own misleading signal.

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32 Witness Purcell saw the truck in full view when it was 100 feet beyond the intersection (J.A. 64) and, therefore, the truck driver could have seen the vehicle in which Purcell was a passenger at the same time.

33 [Witness Purcell] "Well, we stopped and waited for the traffic to go passed [past]. I was looking up New York Avenue and I saw a truck coming down in the other lane." (J.A. 64)

Despite the duty of the truck driver to have acted with a mind to his own signal, he quite blandly admits to the Court and jury that he did not see the automobile as it travelled a minimum of 30 feet[34] at a slow rate of speed across New York Avenue. If the truck driver had a right of way as broad as the Court's instruction, then his failure to see the automobile until only 15 feet away was a good defense to the issue as submitted to the jury, in the light of these actions by the Court:

*Firstly,* the Court refused to give a specific instruction on the truck driver's negligence arising out of the misleading signal (Rejection of Plaintiff's Prayer No. 2).

*Secondly,* the Court advised the jury only in the most general terms with respect to the duty of the truck driver; *i.e.,* to keep a "proper lookout" and to make "reasonable observations." (J.A. 109) The terms were so general that the Court advised the jury, in the same context, that "What observations he should make and what he should do for his own safety are matters which the law does not attempt to regulate in detail except that it does place upon him the continuing duty to exercise ordinary care to avoid an accident." (J.A. 109) The jury was told, in effect, that the law does not define negligence arising out of the giving of a false or misleading turn signal.

*Thirdly,* the Court specifically treats the theory of the defense not in the abstract or general terms already stated, but states specifically that the law recognizes the right of the favored motorist to presume that "the other party will comply with the law and yield to him" (JA 109). So, on the one hand the Court treats the plaintiff's case in general, abstract, terms of "ordinary care" and "reasonable lookout," and, on the other hand, the Court treats the defendants' theory concretely by

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[34] The three lanes of traffic, each 10.5 feet wide, were entirely crossed by the front of the auto which was entirely in the curb lane at the time it was first seen by the truck driver (J.A. 44).

charging the jury that the law specifically provides that the defendant had a right to assume his right of way would be inviolate.

*Fourthly,* the Court has refused to allow into evidence a most important part of the plaintiff's case, *i.e.,* the traffic regulations which defined the turn signal, state when it is to be given, and what it shall mean. These regulations were the more important because the jury asked for and received the ones admitted in evidence in writing during their deliberations when the absence of regulations offered by the plaintiff must have been conspicuous. The purpose of traffic signals is to prevent collisions as the result of changes in direction without warning and that the benefits of the traffic regulations providing for those signals extend to persons who may be injured by such collisions, including passengers, *Sullivan v. LeBlanc,* 100 N.H. 311, 125 A. 2d 642.

*Fifthly,* the Court has without explanation or reason excluded the excited utterance by the driver of the automobile which established clearly that he turned in reliance upon the truck's signal. This exclusion, unless arbitrarily made by the Court, can be only a result of, and consistent with, the other actions taken by the Court in stripping the very heart out of the body of the plaintiff's case and submitting to the jury only the bare bones; for the misleading turn signal was the most important single element in the case in behalf of the plaintff.

As the result of these five actions taken by the Court, the jury was left without adequate facts; without the applicable traffic regulations; and was left in the dark with respect to the law. The plaintiff had a right to have the issue fairly submitted on the facts, the traffic regulations, and the law.[35]

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[35] As against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of a case, if there is evidence to support it and proper request is made. Montgomery v. Virginia Stage Lines, 89 U.S. App. D.C. 213, 191 F. 2d 770; Metropolitan Life Ins. Co. v. Adams, 37 A. 2d 345; Reese v. Wells, 73 A. 2d 899.

## II. THE TRIAL COURT ERRED IN DIRECTING A VERDICT IN FAVOR OF THE APPELLEE, GOLDBERGER

The defendant Goldberger allowed the vehicle to be placed into operation in his own name in order to circumvent the law of New York which required liability insurance to be issued before the motor vehicle can be licensed under the New York law (J.A. 9). The defendant Goldberger admits in its trial brief (J.A. 19) that under the law of New York, Goldberger is liable.[36] We submit that New York law is applicable but under either law Goldberger is liable. When ownership of property passes, is determined by interpretation of the contract of purchase and sale. It is the law of the state where the contract is made, which applies to that interpretation.[37]

It is abundantly clear that if the entire transaction, including the injuries, had occurred in New York the defendant Goldberger would be liable as the owner of the vehicle.[38] It is also clear that if the entire transaction had occurred in the District of Columbia the defendant Goldberger would not be liable[39] as the owner.

The problem arises in this case out of the fact that ownership springs from a contract made and performed in New York. We should, therefore, look to New York law in determining when ownership passed.

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[36] Shuba v. Greendonner, (1936), 271 N.Y. 189, 2 N.E. 2d 536; Phoenix Ins. Co. v. Gitthiel, 2 N.Y. 2d 584, 161 N.Y.S. 2d 874, 141 N.E. 2d 909. (See Trial Brief of defendant Goldberger at J.A. 19).

[37] Croissant v. Empire State Realty Co., 29 App. D.C. 538, (Contracts are to be governed as to their nature, validity and interpretation by the law of the place where made, unless the contracting parties clearly appear to have had some other law in view.); Bayside Flushing Gardens v. Benermann, 36 F. Supp. 706; Hartford Accident and Indemnity Co. v. Delta and Pine Land Co., 292 U.S. 1143, 78 L. Ed. 1178, 54 Supp. Ct. 634, 92 ALR 928.

[38] See note 36.

[39] Since the District of Columbia does not have mandatory insurance as New York does, the same transaction would not have been for the purpose of subverting the applicable law. It is doubtful whether the District of Columbia would allow the titled owner to escape liability if the title were held for the purpose of avoiding our financial responsibility laws; as for example, if the titled owner held title for the benefit of another whose privilege to own and operate had been revoked. In that event, this Court would probably hold the titled owner liable as owner in order to give effect to our law.

The District of Columbia is obliged to recognize the right of New York, through its citizens, to operate a motor vehicle in the District of Columbia. To that extent, the right to operate in the District of Columbia springs from New York law as a matter of comity. If we are obliged to recognize New York law with respect to the right to operate here, we should give effect to all of the law of New York as it relates to that right to operate. That the purported transfer was made in fraud of New York law but not in fraud of the law of the District of Columbia should not justify our sanction to a violation of New York law, nor should we aid and abet the violation of the laws of a sister state. Just as we are required to give effect to the letter of that law, we should likewise give effect to the spirit of it. To do otherwise, would be to fall short of our obligation of full faith and credit. For example, if a motorist had no lawful privilege to operate in New York, he had no lawful privilege to operate in the District of Columbia.

Furthermore, with respect to determining the owner as used in our statute,[40] we would, if the rights of ownership arose in the District of Columbia, apply local law, but in this instance, the right of ownership arose in New York out of a contract made and performed there. Therefore, in determining the owner within the meaning of our statute, we must look to the law of the place where the contract creating the ownership was made. This is simply the application of basic principles of conflict of laws.

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[40] §40-424, D.C. Code, 1961 Ed.

## CONCLUSION

It is respectfully submitted that the trial court erred with respect to the defendants, Rawlings Truck Line, Inc., and John Edward Willis in failing to submit to the jury the evidence, the traffic regulations and the law applicable to the plaintiff's theory of the case. The trial court should have admitted into evidence the traffic regulations offered by the plaintiff, the *res gestae* statement of the automobile operator and should have instructed the jury on the plaintiff's theory of the case.

It is further submitted that the trial court erred in directing a verdict for the defendant Goldberger. The trial court should have denied defendant Goldberger's motion for directed verdict, and should have submitted to the jury the issue of negligence of the operator of the automobile and the resulting liability of Goldberger.

For the foregoing reasons and authorities cited herein, the judgment in favor of the defendants, Rawlings Truck Line, Inc., John Edward Willis and Harry Goldberger should be reversed and the case remanded to the District Court with directions to grant a new trial.

Respectfully submitted,

JOSEPH ZITOMER

1813 Adams Mill Road, N.W.
Washington, D. C.

*Attorney for Appellant.*

# INDEX

# JOINT APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| DAVID M. WILLIAMS, Plaintiff | : | |
| v. | : | |
| RAWLINGS TRUCK LINE, INC., et al, Defendants | : | Civil Action No. 679-59 |
| v. | : | |
| HARRY GOLDBERGER, 3rd Party Defendant | : | |

## RELEVANT DOCKET ENTRIES

| Date | Proceedings |
|---|---|
| 1959 | |
| Mar. 9 | Complaint, appearance, Jury Demand, filed. |
| Mar. 9 | Summons, copies (1) and copies (1) of Complaint issued, Deft. #1 ser. 3-10-59 |
| Mar. 9 | Summons, copies (1) copies (1) complaint issued Deft. #2 ser. 3-10-59 |
| Mar. 11 | Traffic Act Bond of pltf. with National Surety Corp. in the sum of $250.00 approved. McGuire, J. |
| Apr. 10 | Answer of defts. to complt.; c/m 4-10-59; appearance of Galiher and Stewart as attys. for defts. filed. |
| Apr. 10 | Calendared. (N) |
| June 30 | Called. Youngdahl, J. |
| Aug. 24 | Motion for leave to add third-party defts; Notice; P & A; c/m 8-19; Exhibit; Exhibit "A"; MC 8-24-59; filed. |
| Oct. 12 | Order granting motion of defts for leave to add Harry Goldberger, and Joseph Rivera as Third Party Defts. micro 10-13 (N) Holtzoff, J. |

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|---|---|
| Oct. 15 | Third Party Complaint; jury demand; exhibit "A". filed. |
| Oct. 15 | Third Party Summons, copies (2) and copies of third party complt issued vs. third-party defts (defts #3 & 4) |
| Dec. 15 | Motion of Pltf to dismiss third-party complaint for failure to prosecute; P & A; c/m 12-15-59; M.C. 12-15-59. filed. |
| Dec. 15 | Motion of pltf to take deposition of deft #2; c/m 12-15-59. filed. |
| Dec. 22 | Motion of deft to strike notice of deposition; P & A; c/m; M.C. 12-22-59. filed. |
| Dec. 22 | Opposition of defts to pltf's motion to dismiss 3rd-party complaint; c/m 12-22-59. filed. |
| Dec. 30 | Opposition of pltf to deft's motion to strike notice of deposition; c/m 12-30-59. filed. |
| 1960 | |
| Jan. 22 | Traffic Act Bond of pltf in amount of $250.00 with Glens Falls Insurance Co. approved (Curran, J.) and filed. |
| Jan. 22 | Withdrawal of motion to dismiss without prejudice to third party complaint per atty for pltf filed. |
| Feb. 2 | Third party summons, copies (2) & copies (2) of complt. & 3rd party complt. issued to 3 & 4. both ser. 2-2-60. |
| Feb. 2 | Change of address for atty. for deft. #1 filed. |
| Feb. 11 | Order denying motion to strike notice of deposition and/or to require pltf to pay costs; deft's deposition to be taken Feb. 24, 1960 at 4:00 P.M. Rm. 708 Bond Bldg. McGarraghy, J. |
| Mar. 11 | Deposition of deft #2. ($39.60) |
| Mar. 24 | Answer of 3rd-Party deft (3) to 3rd Party Complaint; c/m 3-23-60; Appearance of John L Schroeder for 3rd Party deft; (N/AC). filed. |
| Aug. 24 | First Notice under Rule 13. |
| Sept. 30 | Cause dismissed, as of 9-24-60 (N) AC.N (By Clerk) |
| Nov. 16 | Motion of pltf to vacate dismissal & to reinstate; c/m 11-16-60; M.C. |
| Nov. 21 | Opposition of deft to motion to vacate Rule 13; c/m 11-21-60. filed. |
| Dec. 9 | Order vacating Rule 13 dismissal and reinstating cause to calendar. (N) AC/N filed. |
| Dec. 28 | Motion of pltf to certify to Ready Calendar and to strike third-party complaint as to Joseph Rivera; c/m 12-20-60; filed. |

Dec. 28 Motion by pltf for leave to amend complaint; c/m 12-20-60; P&A; Exhibit A; M.C. 12-28-60. filed.

1961

Jan. 4 Opposition of defts and third-party pltfs to motion to certify to ready calendar and to strike third-party complaint; c/m 1-4-61. filed.

Jan. 16 Order granting pltf's motion for leave to amend complt. with exhibit A attached thereto. (N) Matthews, J.

Jan. 17 Amended complaint; jury demand. filed.

Jan. 25 Answer of defts. #1 and #2 to amended complt. and cross-claim of defts. #1 and #2 vs. deft. #3; c/m 1-25-61. filed.

Feb. 9 Motion of No. 3 deft. for summary judgment; P & A; c/m 2-9-61 & M.C. filed.

Feb. 17 Opposition of defts. and 3rd party pltffs. to motions of pltff. for summary judgment; c/m 2-16-61. filed.

Feb. 27 Exhibit A of deft. Goldberger to motion for summary judgment. filed.

Feb. 28 Defendant Goldberger's Exhibit B to motion for summary judgment. filed.

Mar. 4 Answer of deft. Harry Goldberger to amended complt; cross claim vs. defts. #1 and 2; c/m 3-3-61.

Mar. 7 Order continuing to March 21, 1961, for further hearing motion of pltff. to place cause on Ready Calendar. (N). Walsh, J.

Mar. 7 Order denying motion for summary judgment. (N). Walsh, J.

Mar. 10 Motion of deft. #1 for security for costs; Notice; c/m 3-8-61; P & A; M.C. 3-10-61. filed.

Mar. 10 Answer of deft. #3 to cross-claim of Nos. 1 & 2; c/m 3-8, filed.

Mar. 18 Opposition of pltff. to motion for security for costs; c/m 3-17-61. filed.

Apr. 7 Order denying motion for security for costs filed by Harry Goldberger deft. and cross-deft. (N). Matthews, J.

Apr. 12 Order continuing hearing on motion of pltff. to place cause on ready calendar for thirty days; cause to be placed on ready calendar by filing praecipe as of that date; granting defts. and third party pltffs. further stay for placing case on ready calendar if further time is required to effect service on third party deft; discovery procedures to remain open to all parties to and including date of pretrial. (N). Walsh, J.

May 26 Notice by defts. to take deposition of pltff; c/m 5-24-61. filed.

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|---|---|
| July 11 | Deposition of pltf by deft ($84.70) filed. |
| Oct. 27 | Order certifying cause to Ready Calendar (AC/N) (N) McGuire, C.J. |
| 1963 | |
| Apr. 4 | Pretrial Proceedings (3-20-63) Pretrial Examiner |
| Apr. 30 | Trial brief of law by deft. #3; c/m 4-30-63. filed. |
| Apr. 30 | List of witnesses of deft. #3. filed. |
| May 2 | Trial memorandum of pltff on liability; c/m 5-1-63. filed. |
| June 17 | List of witnesses for pltf; c/m 6-16-63. filed. |
| Oct. 9 | Trial brief of defts. Rawlins Truck Line, Inc. and John E. Willis; c/m 10-9-63. filed. |
| Oct. 10 | Letter to Harry M. Hull, Clerk from William E. Stewart, dated 10-9-63. filed. |
| 1964 | |
| Jan. 23 | Jury sworn; two alternate jurors sworn; trial respited until January 24, 1964. (Rep: Eva M. Sanche) Tamm, J. |
| Jan. 24 | Trial resumed; same jury and alternate jurors; respited until January 27, 1964. (Rep: Eva M. Sanche) Tamm, J. |
| Jan. 24 | Verdict and judgment for Harry Goldberger, 3rd-party deft. vs. 3rd-party pltfs, by direction of the Court (N). Tamm, J. |
| Jan. 24 | Verdict and judgment for Harry Goldberger, deft., vs. the pltf, by direction of the Court, (N) Tamm, J. |
| Jan. 27 | Trial resumed; same jury and alternate jurors; alternate jurors discharged; verdict for the defendants. (Rep: Eva M. Sanche) Tamm, J. |
| Jan. 27 | Verdict and judgment for the defendants against the plaintiff. (N). Tamm, J. |
| Jan. 27 | Instructions of plaintiff. filed. |
| Feb. 24 | Notice of appeal by pltf from orders of January 24, 1964, and January 27, 1964. Copies mailed to Galiher and Stewart and John E. Schroeder; deposit by Zitoner, $5.00. filed. |
| Mar. 2 | Cost Bond on appeal of plaintiff with Glens Falls Insurance Co. in the sum of $250.00 approved and filed. Keech, J. |
| Mar. 26 | Order extending time to file record on appeal to and including May 24, 1964. (N) Keech, J. |
| May 14 | Transcript of proceedings, 1-23, 24 & 27-64; Vol. I; pp. 1-231. filed. (Rep. Eva Marie Sanche, Court's copy) |
| May 25 | Exhibits 1-A, 1-B, 1-C, 1-D, 1-E & 1-F filed. |
| May 25 | Exhibit (Blackboard) & Motor Vehicle Regulations filed. |

[Filed January 17, 1961]

AMENDED COMPLAINT
(Personal Injuries)

1. The plaintiff is an adult citizen of the State of New Jersey; the defendant Rawlings Truck Line, Inc., is a Virginia Corporation, and the defendant John E. Willis is a citizen of the Commonwealth of Virginia. The defendant and third-party defendant, Harry Goldberger, is an adult citizen of the State of New York and was at all times material herein the registered owner of the motor vehicle operated by Joseph Rivera and bearing New York State registration and license plates, in which vehicle the plaintiff was a passenger at the time of the collision complained of.

2. On, to-wit, the first day of June, 1958, the defendant Rawlings Truck Line, Inc., a corporation, was the owner of a truck then and there operated by Rawlings Truck Line, Inc., by and through its agent, servant, employee or permissive user, John E. Willis, in a northerly direction on New York Avenue, Northeast, a public highway in the District of Columbia, in a negligent and careless manner, and in violation of the traffic rules and regulations then and there in effect in the District of Columbia. As a result of the negligence and carelessness of the defendants Rawlings Truck Line, Inc., and John E. Willis, as aforesaid, or as a result of the negligence of the defendant Harry Goldberger, acting by and through his agent, servant, employee or permissive user, Joseph Rivera, or as a result of the negligence of all defendants, the said truck ran into and collided with the automobile operated by Joseph Rivera and owned by defendant Harry Goldberger in which the plaintiff, David M. Williams, was then and there a passenger.

3. As a result of the collision, as aforesaid, the plaintiff David M. Williams suffered severe, painful and permanent bodily injuries, contusions, abrasions and lacerations to the body; concussion of the brain; a puncture of the lung resulting in the collapse thereof; injury to his back; all of which injuries are permanent, together with other painful, permanent and disabling injuries; and the plaintiff further suffered excruciating

physical and mental pain; anxiety and humiliation; and physical, mental and nervous disorders; and he is and has become totally and permanently disabled; and has received and will require hospitalization and medical care for a prolonged period of time in the approximate value of Ten Thousand Dollars ($10,000).

WHEREFORE, the plaintiff demands judgment against the defendant Rawlings Truck Line, Inc.,and the defendant John E. Willis, and the defendant Harry Goldberger, jointly and severally in the total sum of One Hundred Thousand Dollars ($100,000) besides costs.

/s/ Joseph Zitomer

* * *

Attorney for Plaintiff

JURY DEMAND

The plaintiff herein demands trial by jury.

/s/ Joseph Zitomer

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[Filed January 25, 1961]

ANSWER OF DEFENDANTS, RAWLINGS TRUCK LINE, INC. AND JOHN E. WILLIS, TO AMENDED COMPLAINT AND CROSS CLAIM OF DEFENDANTS, RAWLINGS TRUCK LINE, INC. AND JOHN E. WILLIS, AGAINST DEFENDANT HARRY GOLDBERGER

First Defense

The Amended Complaint fails to state a claim upon which relief may be granted.

Second Defense

The Defendant, Rawlings Truck Line, Inc., admits its incorporation and the ownership of a vehicle involved in an accident on June 1, 1958 with a second vehicle operated by Joseph A. Rivera in the District of Columbia and that the latter vehicle owned by the Co-Defendant, Harry

Goldberger. Both of these Defendants admit they are non-residents of the District of Columbia and that the individual Defendant, Willis, was operating the vehicle of the corporate Defendant, Rawlings Truck Line, Inc., at the time and place of the accident with the permission and consent of the corporate Defendant and they further admit the happening of the accident on the date alleged on New York Avenue, N. E., when the vehicle owned by the Co-Defendant, Goldberger, and operated with his permission and consent by the Third Party Defendant, Rivera, and in which vehicle Plaintiff was a passenger attempted a left-hand turn in the path of Defendant's vehicle. These Defendants admit that the Defendant, Goldberger, and the Third Party Defendant, Rivera, were negligent; these Defendants do not have sufficient information or knowledge to form a belief as to the allegations of injuries and damages alleged to have been sustained by the Plaintiff and can therefore neither admit nor deny the same. These Defendants deny each allegation of negligence and every other allegation contained in the Amended Complaint which are asserted as to them.

Third Defense

The injuries and damages, if any, sustained by Plaintiff occurred as the result of the negligence and carelessness of Defendant, Harry Goldberger, and/or Third Party Defendant, Joseph A. Rivera.

CROSS CLAIM

For their Cross Claim against the Defendant, Harry Goldberger, the Defendants, Rawlings Truck Line, Inc. and John E. Willis, respectfully submit as follows:

1. These Defendants and Cross Claimants do hereby aver that the Plaintiff, David M. Williams, was, at the time and happening of the accident, referred to, in the Amended Complaint, riding as a passenger in the automobile owned by Defendant, Harry Goldberger, and operated with his permission and consent by the Third Party Defendant, Joseph Rivera, and that the injuries and damages, if any, sustained by the Plaintiff, David M. Williams, were caused by the negligence and carelssness of the Defendant, Goldberger, and/or the Third Party Defendant, Rivera, in the operation of their vehicle at the time and place of the accident.

In the alternative these Defendants do hereby aver that the injuries and damages, if any, sustained by the Plaintiff resulted from the contributory negligence of the Defendant, Harry Goldberger and/or Third Party Defendant, Joseph Rivera.

WHEREFORE, the Defendants, Rawlings Truck Line, Inc. and John E. Willis, demand judgment over and against the Defendant, Harry Goldberger, as indemnification or contribution in whole or in part for any sums adjudged in favor of the Plaintiff agains these Defendants and Cross Claimants.

GALIHER & STEWART

By /s/ William E. Stewart, Jr.
Attorneys for Defendants and
Third Party Plaintiffs.
Rawlings Truck Line, Inc. and
John E. Willis

* * *

[Certificate of Service]

EXHIBIT "A"

[Filed February 9, 1961]

[Attached to Motion for Summary Judgment]

AFFIDAVIT

STATE OF NEW YORK )
COUNTY OF BRONX ) SS:-

HARRY GOLDBERGER, being duly sworn on oath, says as follows:

I live at 190 West 170th Street, Bronx, New York, and am 70 years of age.

On May 3, 1958 I sold my 1950 Mercury, engine No. 50ME59243, license plate No. BB2261 to Joseph A. Rivera of 532 Tinton Avenue, Bronx, New York.

At the time of the sale, Joseph Rivera was in the U.S. Marine Corps and he paid me a $25.00 deposit on the day of the sale and on the following week, his mother paid me the balance of the purchase price which was $125.00.

On the day of the sale, I signed the back of the registration card and transferred the car to Joseph Rivera. It was our agreement that he would drive the car to the Marine base where he was stationed, using my license plates. When he arrived at the base, he was to get his own license plates, and mail my plates to me so that I could take the car off my auto insurance. After a week's time, I did not get my license plates, I asked his mother why he did not return my license plates, and she told me that he was sick and could not get his own license plates.

It is my understanding that Mr. Rivera was involved in an automobile accident on June 1, 1958 with his automobile in the District of Columbia and that he was struck by a vehicle owned by Rawlings Truck Lines and that Rawlings Truck Lines paid him for the damages to the vehicle; however, I have been unable to verify the payment indicated.

A few days after June 1, 1958 Mr. Rivera brought the license plates in to my wife's place of business and told her that his car had been in an accident with a truck, and that he was paid for the damages by the truck line.

I turned my plates in to the license bureau a few days later and had the insurance on this car cancelled.

/s/ Harry Goldberger

[JURAT the 21st day of December 1961]

[Filed March 4, 1961]

**ANSWER OF DEFENDANT HARRY GOLDBERGER TO AMENDED COMPLAINT AND CROSS-CLAIM OF DEFENDANT HARRY GOLDBERGER AGAINST DEFENDANTS RAWLINGS TRUCK LINE, INC. AND JOHN E. WILLIS.**

First Defense

The Amended Complaint fails to state a claim upon which relief may be granted.

Second Defense

The defendant, Harry Goldberger, admits that he is a citizen of the State of New York, but denies that he was the registered owner of a motor vehicle operated by Joseph Rivera bearing New York State registration and license plates in which vehicle the plaintiff was a passenger at the time of the collision complained of; this defendant admits an accident happened on June 1, 1958 involving the defendant, Rawlings Truck Line, Inc. and the truck which it owned and which was operated by its agent, servant and employee John E. Willis on New York Avenue in the District of Columbia, and this defendant admits that the defendants, Rawlings Truck Line, Inc. and John E. Willis were negligent and careless and operated said vehicle in violation of the traffic rules and regulations then and there in effect in the District of Columbia. But this defendant denies the allegations of negligence as relating to Harry Goldberger and further denies that Joseph Rivera was his agent, servant, employee or permissive user. Defendant Goldberger does not have sufficient information or knowledge to form a belief as to the allegations of injuries and damages alleged to have been sustained by the plaintiff and can therefore neither admit nor deny same. Defendant Goldberger denies each allegation of negligence and every other allegation contained in the Amended Complaint which are asserted as to him.

Third Defense

The injuries and damages, if any, sustained by plaintiff occurred as a result of the negligence and carelessness of the defendants, Rawlings Truck Line, Inc. and John E.Willis.

## CROSS-CLAIM

For cross-claim against the defendants, Rawlings Truck Line, Inc. and John E. Willis, the defendant, Harry Goldberger, submits the following:

1. The defendant, Harry Goldberger, does hereby aver that the plaintiff, David M. Williams, was at the time and happening of the accident, referred to, in the Amended Complaint, riding as a passenger in an automobile owned and operated by the third party defendant Joseph Rivera, and that the injuries and damages, if any, sustained by the plaintiff, David M. Williams, were caused by the negligence and carelessness of the defendants, Rawlings Truck Line, Inc. and John E. Willis in the operation of their vehicle at the time and place of the accident.

2. In the alternative, defendant Goldberger does hereby aver that the injuries and damages, if any, sustained by the plaintiff resulted from the contributory negligence of the defendants, Rawlings Truck Line, Inc. and John E. Willis.

WHEREFORE, the defendant, Harry Goldberger, demands judgment over and against the defendants, Rawlings Truck Line, Inc. and John E. Willis, respectively, as indemnification or contribution in whole or in part for any sums adjudged in favor of the plaintiff against the defendant, Harry Goldberger.

By /s/ John L. Schroeder
John L. Schroeder
Attorney for Defendant
Harry Goldberger

[Certificate of Service]

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[Filed March 10, 1961]

## ANSWER TO CROSS CLAIM OF DEFENDANTS RAWLINGS TRUCK LINE, INC. AND JOHN E. WILLIS

The defendant, Harry Goldberger, for Answer to the Cross-Claim of the defendants Rawlings Truck Line, Inc. and John E. Willis,

admits that the plaintiff, David M. Williams was, at the time and happening of the accident, referred to, in the Amended Complaint, riding as a passenger in the automobile driven by Joseph Rivera, but denies that the vehicle was owned by the defendant Harry Goldberger and further denies that the automobile in which the plaintiff David M. Williams was riding as a passenger was operated with the permission or consent of the defendant, Harry Goldberger. The defendant Harry Goldberger also denies that the injuries and damages, if any, sustained by the plaintiff, David M. Williams, were caused by any negligence and carelessness of the defendant, Harry Goldberger, and/or the third party defendant, Joseph Rivera, in the operation of the vehicle in question at the time and place of the accident.

The injuries and damages, if any, sustained by the plaintiff occurred as the result of the negligence and carelessness of the defendants Rawlings Truck Line, Inc. and John E. Willis.

WHEREFORE, the defendant Harry Goldberger demands that the cross-claim of the defendants Rawlings Truck Line, Inc. and John E. Willis be dismissed with cost.

/s/ John L. Schroeder
John L. Schroeder
Attorney for Defendant
Harry Goldberger

* * *

[Certificate of Service]

[Filed April 4, 1963]

PRE-TRIAL PROCEEDINGS

Tort for personal injuries.

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS AND STIPULATE THERETO: At about 10 p.m. June 1, 1958, it was drizzling, streets wet. A truck owned by D Rawlings Truck Line, Inc. and operated on its business by its employee D Willis, acting within the scope of his employment, was travelling in an easterly direction on New York Ave. N.E., Wash., D.C. Near the intersection of 16th St., Rawlings' truck was involved in an accident with a vehicle which had been proceeding in a westerly direction on N.Y. Ave. but was in the process of making a left turn into a filling station at 1601 N.Y. Ave. P was a passenger in this vehicle.

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PLAINTIFF and Ds Rawlings and Willis assert that the vehicle which came in contact with the Rawlings truck was owned by co-defendant Harry Goldberger and was being operated with his permission and consent by one Joseph A. Rivera.

P claims that the accident, his injuries and damages were caused by the negligence of Ds Rawlings, Willis and Goldberger or their violations of D.C. traffic reg., as follows:

Rawlings and Willis: failure to observe Goldberger's automobile in roadway while it was signalling an intention to make a left turn; failing to give full time and attention to operation of truck; failure to observe the Goldberger automobile begin its turn and while in its turn; failed to observe what should, in the exercise of reasonable care, be observed; failure to give warning of his change of mind as to his intention to make a right turn by either blinking his lights, blowing his horn, or slowing his vehicle; failure to proceed with great caution under the circumstances knowing (or should have known) that he had given a right turn signal which he did not execute and that others in or about the road would be misleaded by that signal and might rely thereon; failure to yield the right of way after yielding that right of way by indicating the intention to make a right turn; leaving a right turn signal on (in the alternative) with no intention of

executing the turn; failure to avoid collision; excessive speed in view of the weather and special hazards of the road and the special hazard created by his improper signal; speed in excess of the speed limit.

Goldberger: Making a left turn when traffic is approaching at a point when it was not safe to do so; making an illegal left turn; failure to yield to the approaching truck (in the alternative); failure to maintain proper lookout; failure to avoid colliding; failure to give full time and attention; failure to keep vehicle under control so as to avoid colliding.

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AS TO ALL DS, PLAINTIFF RELIES ON THE DOCTRINE OF RES IPSA LOQUITUR.

DEFENDANTS RAWLINGS TRUCK LINE AND WILLIS, in defense of the claims of P, and in support of their CROSSCLAIM against Goldberger for indemnity or contribution, deny any negligence or violations of traffic reg. and assert that the accident, and P's injuries and damages, if any, were caused by the sole or contributory neg. of Goldberger, or his viol. of D.C. traffic reg. relying upon the allegations of negligence and traffic violations asserted by P against said Goldberger.

As stated above, these Ds have crossclaimed for indemnity or contribution against D Goldberger on the basis that he was the titled owner of the vehicle operated by Rivera and that under the law of the D of C, Rivera is presumed to be his agent. In responding to D Goldberger's claim that he had sold this automobile to Rivera, these Ds and Cross Claimants assert that the license tags on said car were those issued to Goldberger and as a result, the sale had not been consummated and title had not passed; further, that under the law of New York, where the alleged sale occurred, the titled owner, Goldberger, continues to be responsible for the use of the vehicle by reason of the continuation of use of the license tags.

Ds deny the applicability of res ipsa loquitur.

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DEFENDANT/CROSS-DEFENDANT HARRY GOLDBERGER denies that he owned any automobile operated by Joseph Rivera and denies

that the automobile in the accident was operated with his permission and/or consent. Denies that the collision was caused by any negligence or violations of traffic regulations on his part, and asserts that the collision was caused by the sole negligence of or viol. of D.C. traffic reg. by Ds/3rd party D's Rawlings Truck Line, Inc. and Willis, relying upon the allegations of P regarding traffic violations and negligence, denies the applicability of res ipsa loquitur.

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The PERSONAL INJURIES, both temporary and permanent, and SPECIAL DAMAGES made by P are attached hereto, made a part hereof, and incorporated herein by reference, marked "A", (including P's witnesses).

STIPULATIONS

The witnesses whom Ds may use at the trial will be, and if P has additional witnesses who will be, used at the trial of the case, all such witnesses, including expert and medical witnesses, will be named by letter to the Clerk of Court and opposing counsel on or before May 1, 1963.

The following may be admitted in evidence without formal proof, subject to all legal objections: the D.C. traffic reg. listed herein; and those of which counsel advise opposing counsel and the Clerk of Court on or before May 1; hospital records; x-ray plates; HEW Mortality Table; photographs in deposition of John E. Willis; records of N.Y. Commissioner of Motor Vehicles, provided same are initialled by counsel for all parties.

Counsel for P desires to take the depositions of Drs. Murphy Cosciano and Doyle, all of Jersey City, N.J. This may be taken provided no delay in the trial of the case results therefrom.

Counsel for P agrees to furnish to counsel for Ds a written authorization, which will be supplied by D within 5 days, and returned to D on or before May 1,1963, which will enable D to obtain copies of P's

federal income tax returns for the years 1958 to date.

Counsel for D Rawlings may take the deposition of personnel of the U.S. Navy Bureau of Personnel in charge of the service records, including medical records, of P while in the U.S. Marine Corps., provided, however, there is no delay in the trial of the case.

P will rely upon the following D. C. traffic regulations as to all defendants: 99c, 22a, 39b, 146c and d, 47a, 39a.

As to Ds Rawlings Truck Lines and Willis, he will rely upon the following: 22a,b,c; 21a; 132b; 39b; 36, 40a; 39a; 143 and 47a and 47b, and 38.

The parties agree to the mutual exchange of all medical reports of examining or treating physicians, now in hand, on or before April 25, 1963, and a similar exchange of all other such reports within 48 hours of the alert of this case for trial.

Counsel for P agrees to make the P available for the purpose of a physical examination by a physician of D's choice before, but not to interfere with, trial [and a copy thereof to plaintiff will get a copy of report promptly per Donnelly.]

The parties shall file with the Clerk of the Court a brief, pursuant to Sec. II-F of the Pretrial Instructions to Counsel, furnishing opposing counsel with a copy thereof, on or before May 1, 1963.

The Examiner has requested counsel for Ds to appear at trial with the maximum amount of authority to settle this case which will be allowed him by his principal.

/s/
Pretrial Examiner

TRIAL COUNSEL:

/s/ Joseph Zitomer, Esq. for P

/s/ John L. Schroeder, Esq. for D Goldberger

/s/ William E. Stewart, Jr., Esq. for
D Rawlings & Willis

ATTACHMENT "A" TO PRE-TRIAL PROCEEDINGS

PERSONAL INJURIES:

Traumatic pneumothorax

50% collapse of the lung,right side

Costochondritis

Difficulty in breathing

Marked tenderness over the 8th right costochondral junction

Xiphoid process over the lower sternum

Costal cartilage over the lower sternum

Pain in right posterior chest, right shoulder and right lower anterior chest

Numbness in the fingers of right hand and twitch above elbow;

Dyspneic condition;

Pain in right lower back radiating up to right shoulder blade and into the right chest and transversely around the ribs, and in lumbo-sacral and dorsal regions

Numbness from the neck radiating down to right shoulder and then down right arm to fingers

Neuritis of the 3rd, 4th, 5th cervical vertebrae, right side.

Ulnar nerve neuritis of right arm

Intercostal neuralgia of 7th, 8th & 9th dorsal nerves

Lumps in chest

Psychogenic overlay to these injuries resulting in nervous condition manifested in pains in stomach, headaches and nervous stomach; difficulty sleeping and breathing

Pain and suffering, both physical and mental; mental anxiety and humiliation and nervous disorder.

Permanent (plaintiff 21 years of age at time of accident)

All of the above described injuries are permanent excepting only the collapse of the lung, right side.

Total disability: June 1, 1958, through July 15, 1958. Bethesda Naval Hospital, June 1, 1958, to June 30, 1958, and then back to Bethesda Naval Hospital one week in July. Intermittently since discharge from Hospital approximately 30 days.

Partial Disability: As stated under permanent injury above.

SPECIAL DAMAGES:

| | |
|---|---|
| Bethesda Naval Hospital for reasonable value of hospitalization | $1,000.00 |
| DC General Hospital | 65.00 |
| Dr. Edward A. Murphy | 260.00 |
| Dr. Cosciano (189 Harrison Ave., Jersey City, NJ) | 40.00 |
| Dr. Doyle (97 Duncan Ave., Jersey City, NJ) | 40.00 |
| Medicines | 30.00 |
| Dr. Joseph W. Peabody, Jr. | 25.00 |
| Total medical expenses to date: | $1,460.00 |
| Also future medical expenses, estimated | 7,500.00 |
| Loss of earnings, 10 days at $13 per day | 130.00 |
| Also future loss of earnings, | |

WITNESSES:

The names and addresses of the witnesses whom the plaintiff will use at the trial are as follows:

1. Plaintiff and his wife. Damages and injuries, and occurrence.
2. Defendants (occurrence).
3. Joseph A. Rivera (address unknown) (occurrence).
4. Frank Napoleon (address unknown) (occurrence).
5. Joseph Purcell, 258 Maple St., Secaucus, N. J. (occurrence).
6. Allan L. Nairn, MPD, AIU (occurrence).
7. Rap P. Juul, MPD, AIU (occurrence).
8. Raymond E. Merchant (home address unknown) employed at 1601 New York Ave., N.E. Washington, D.C. (occurrence).
9. Alvin L. Ridley, 1226 F St.,N.W., Washington, D. C., employed at 1601 New York Ave., N.E., Washington, D.C. (occurrence).
10. Dr. Joseph W. Peabody, Jr., (injuries)
11. Dr. Edward A. Murphy, 386 Summit Avenue, Jersey City, NJ (injuries).
12. Dr. Doyle, 97 Duncan Ave., Jersey City, N. J. (injuries).
13. Dr. Cosciano, 189 Harrison Ave., Jersey City, N. J. (injuries).
14. Superintendent, D. C. General Hospital (as to record and x-rays).
15. Custodian of hospital records of U. S. Navy.

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[ Filed April 30, 1963]

## TRIAL BRIEF OF LAW INVOLVING THE DEFENDANT HARRY GOLDBERGER

The essential point of law involved in this case concerning the defendant Harry Goldberger is the effect of his transfer of the subject automobile to Rivera. It is this defendant's contention that the points and authorities cited below will indicate (a) that it is clearly the public policy of the State of New York to estop a former owner from proving a sale where he has failed to remove the license plates and change the registration where the accident occurs in New York, (b) that no such public policy

exists in the District of Columbia and that a former owner may prove the sale in the event of a subsequent accident, and (c) that since this accident occurred in the District of Columbia, District of Columbia law should apply.

The public policy for the State of New York was established by the case of Shuba v. Greendonner (1936), 271 N.Y. 189, 2 N.E. 2d 536. In the Shuba case the defendant, a resident of Connecticut, had a car registered in his own name to avoid the showing of financial responsibility required in order to register the car in the name of his minor son. The minor son had an accident in the State of New York and the father was sued as the registered owner. The issue was whether or not it was error to allow the defendant to show facts evidencing that his son was the real owner of the automobile. It was held that it was error and the case was reversed. The court held that New York law applied even though the car was owned and registered in Connecticut. The car was operated in New York by virtue of the statutes of both states. After a review of the statutes the court held that it would be against the public policy of New York to allow the registered owner to deny his ownership – he was estopped to deny his ownership. It was the public policy of the State of New York that was being enforced. To quote the applicable part of the reasoning of the court:

> "In this case it is necessary to consider the question not there presented, whether one who has deliberately caused a car to be registered in his name as owner will be permitted, after it has been involved in an accident and caused injury, to deny the truth of that statement.
>
> "Whether we call it an estoppel or whether we decide the action of the legislature in regulating the use of such vehicles in this state establishes our public policy makes no difference in the final result. The legislature has been very specific in making rules for the purpose of facilitating identification of an owner by the police and the public, fastening the responsibility for injuries and requiring evidence of ability to respond in damages to injured persons.

The vehicle and traffic law embodies most of these provisions. Under Section 11, the owner must make application for registration. He must submit such evidence of ownership as the Commissioner requires. The certificate of registration must be carried in the car and when requested it must be shown to a police officer. The person must furnish any information necessary to identify the vehicle or its owner. The negligence of an operator other than the owner will in certain circumstances be attributable to the owner. Section 59. Strict regulations are enacted for the sale of an automobile and the registration thereof by the vendee and for the issuance and limited use of dealers plates. Sections 61, 63. Section 71 regulates the revocation of certificates of registration by a court in enumerated circumstances, such as certain violations of law, mental or physical disability, persistent violations of the law, gross negligence, etc. Article 6-A (Section 94 et seq.) provides that certain classes of drivers must submit evidence of financial responsibility. In view of such provisions of our statute, can we say that one who has intentionally registered a vehicle in his own name can, after an accident, prove that he had never owned the vehicle? To allow that would be contrary to our public policy and nullify the statutory regulations.

"That this vehicle was registered in another state should make no difference. We are not attempting either to interpret or enforce the public policy of another state. This vehicle was permitted to operate upon our highway by virtue of our statutes as our statutes provide that registration obtained in another state make operation here lawful."

Subsequent cases in New York which are squarely on the point with the subject case cite the Shuba case in support of the public policy of New York that the registered owner is estopped to prove a sale of the automobile. For a series of such cases see Volume 62A McKinney's Consolidated Laws of New York Annotated, page 351, Vehicle and Traffic Law,

Section 420, Notes of Decisions No. 3 — "Plates, removal of". The cases cited there clearly show that the public policy of New York as set forth in the Shuba case has been followed consistently since 1936. For a very recent case showing no change in the law of New York to-date, see 236 N.Y. S. 2d 643 dated January 1963.

In the District of Columbia it is equally clear that no public policy such as exists in New York is supported by our court. The case of Burt v. Cordover (D.C. Mun. App.) (1955), 117 Atlantic 2d, 116, states the District of Columbia law. The Cordovers (a mother and son) agreed to sell their automobile to one Bennett. On August 21, 1952 they delivered the auto to Bennett along with an assignment of title that was not correct in every legal respect. Bennett collided the next day with Burt who is the plaintiff here. The court found sufficient facts to conclude that there was a bona fide sale. The issue in the case was whether or not the Cordovers were the owners by reason of the fact that the car was still registered in their name. It was held that they were not the owners, that they had proven a bona fide sale. The court discusses the fact that in some states the contention of the plaintiffs would be upheld, that the Cordovers would be estopped from proving the sale but that this was not the law of the District of Columbia. The court stated:

> "While there is some authority in other states to the contrary, we believe that the better reasoned opinions on this question hold that where the seller's and buyer's minds have met upon all the essential terms of the contract of sale, and thereafter the automobile is delivered by the seller and accepted unconditionally by the buyer, such a transaction constituted a sale in which the title passes to the buyer even though there has not been a compliance with the registration law of the state."

The Burt case cites Gasque v. Baidman (D.C. Mun. App.) 44 A 2d 537. In the Gasque case the court states, at page 538, that it "has been settled in this jurisdiction by Mason v. Automobile Finance Co., 73 App. D.C. 284, 121 F 2d 32," that liability as owner of a vehicle can not be

fashioned from the single fact of ownership of the naked legal title because of registration. Thus it appears to be settled law in the District of Columbia that no such public policy as exists in New York is to be applied here.

It is the contention of this defendant that the District of Columbia law should be applied to this case because the accident happened in the District of Columbia. This is the normal law of conflicts of laws regarding torts. This law might also be regarded as a rule of evidence because the party is estopped to prove a certain fact and if it is a rule of evidence again the District of Columbia law should apply. The New York Court, in the Shuba case set out above, had no difficulty in applying New York law where the accident happened in New York even though the registration and ownership of the automobile was in Connecticut.

The defendant Goldberger should be allowed to present proof of his sale of the subject automobile to Rivera prior to the date of the accident.

Respectfully submitted,

/s/ John L. Schroeder
Attorney for defendant
Harry Goldberger

* * *

[Certificate of Service]

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[Filed May 2, 1963]

## PLAINTIFF'S TRIAL MEMORANDUM ON LIABILITY OF DEFENDANT GOLDBERGER

The brief of defendant Goldberger contains its own answer in the cases there cited: Burt v. Cordover, DC Muni Ct of App, 117 A2d 116, indicia of ownership was not deliberately withheld. The Municipal Court of Appeals there stated the purpose of the DC Statute as follows:

> "to place the liability upon the person in a position immediately to allow or prevent the use of the vehicle and to do so by giving a lawful and effective consent or prohibition to its operation by others" 117 A2d 116, 117.

In the case of Harry Goldberger he had the absolute right to prohibit the use of the automobile or to control its use by simply removing the license plates from the vehicle which he allegedly sold. Instead he deliberately allowed and encouraged the use of the vehicle when he knew or should have known that without those license plates the vehicle could not be operated. In the language of Burt v. Cordover then, he was "in a position immediately to allow or prevent the use of the vehicle", and as that person in the position of control he was the owner within the definition of our statute.

In addition the law of New York would not allow a transfer of ownership of the vehicle without evidence of financial responsibility in the form of a public liability insurance policy, and the alleged vendee of the auto was not entitled to registration of the auto in his name, and hence the second test of Burt v. Cordover fails: See 117 A2d 116, 117 where the Municipal Court of Appeals applied the test of whether the vendee was then entitled to register the vehicle in his name even if he had not then done so. Here the license plates were allowed to remain on the vehicle for the very reason that as of that time the vendee had no right to have the vehicle registered in his own name as he did not have evidence of financial responsibility.

Finally, on the question of transfer of the vehicle the law of New York applies as the place of the contract. Questions relating to the ownership or titling of the vehicle are answered by the law of the place of the contract and titling and are unaffected by the law of the place of the tort. Only questions relating to negligence and damages apply local law.

The District of Columbia has never answered the question raised by deliberately allowing improper license plates on the automobile to circumvent the law relating to the operation. Those cases cited by the defendant Goldberger are those in which there was no deliberate intention to circumvent the law; that there were no prohibitions which were being evaded. It therefore follows that the reasoning of Burt v. Cordover which allowed that the vendee in that case was then entitled to registration does not apply here as it was expressly because the vendee was not entitled to registration that the license plates remained on the car indicating Goldberger to be the owner.

/s/ Joseph Zitomer
Attorney for Plaintiff

* * *

[Certificate of Service]

[ Filed May 22, 1964]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

Washington, D. C.
Thursday,
January 23, 1964

The above-entitled matter came on for trial before the HONORABLE EDWARD A. TAMM, United States District Judge, and a jury, at 10:00 a.m.

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THE DEPUTY CLERK: Case of David M. Williams versus Rawlings Truck Line, Incorporated, et al.

(Whereupon preliminaries, voir dire examination and opening statements on behalf of all parties, reported but not made a part of this record.)

THE COURT: You may call your first witness, Mr. Zitomer.

MR. ZITOMER: Thank you, Your Honor.

Whereupon,

DAVID M. WILLIAMS

called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ZITOMER:

Q. Will you state your full name and address, sir? A. David Michael Williams, 2 Stegman Terrace, Jersey City, New Jersey.

Q. Mr. Williams, you were in the Marine Corps in June of 1958, were you? A. Yes, sir.

Q. Where were you stationed at that time? A. Camp Lejeune, North Carolina.

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Q. Now, did you have occasion on or about the 1st of June to come through Washington to New Jersey? A. Yes, for a weekend.

Q. How did you go from Camp Lejeune to New Jersey, and when did you come? A. We went from Camp Lejeune to Jersey City — we had gotten a ride up but I don't remember the fellow we came up with.

In other words, you could pay someone who was going into the area to take you up.

Q. Then you had a ride with someone else in a vehicle? A. Yes.

Q. Did you ride back with the same person? A. No, we didn't.

Q. When did you leave New York? Was it New Jersey or New York? A. New Jersey.

Q. When did you leave New York to return to Camp Lejeune?

THE COURT: You mean New Jersey?

MR. ZITOMER: New Jersey. I am sorry.

THE WITNESS: Two or three o'clock in the afternoon, Sunday, the 1st of June.

BY MR. ZITOMER:

Q. When you left New Jersey, were you riding in a vehicle in company with other marines? A. Yes, I was.

Q. Will you tell the Court and jury who they were? A. There was Mr. Joseph Rivera, Mr. Joseph Purcell, myself, and two other fellows whom I don't remember their names. They were in the back seat. They were from the Marines but I don't know their names.

Q. Were they Frank and Louis Napoleon? A. That is right, brothers.

Q. When you left to return, who was driving the car? A. Joe Rivera had the car so he drove up to pick up myself and Joe Purcell, who also comes from New Jersey, Jersey City. Joe was driving at the time when he picked us up.

Q. On your route from New Jersey down to Camp Lejeune, did anything unusual occur before you reached the city of Washington? A. No, sir.

Q. Do you recall how many stops you made, if any? A. Well, we normally would make, say, two or three or four, depending on the amount of gas and who wanted to get coffee and things like that.

Q. Did you stop for any other occasion other than take care of anything personal or for gasoline? A. No.

6 Q. Now, as the car was approaching the city of Washington, who was driving? A. Joseph Rivera.

Q. How were you seated in the car? A. I was seated in the front seat between Joe Rivera and Joseph Purcell.

Q. Do you recall how long you had been in that position? A. I would say about an hour or so, maybe a little more.

Q. Was there anything unusual about the manner in which Joe Rivera operated the car before you came into Washington? A. No, sir.

Q. Now, do you recall that portion of the ride on New York Avenue in the city of Washington, just prior to the accident? A. Vaguely.

Q. Will you tell the Court and jury in your own words what happened as you proceeded into Washington on New York Avenue? A. Well, we were coming into Washington on New York Avenue and we needed some gas, and we also wanted to switch drivers.

7 So, I was in the front seat and I wasn't really paying too much attention. It was raining pretty hard and there was some traffic coming the other way, which I thought was north at the time. I thought we were headed south. So, we pulled up and we were trying to look for a gasoline station. There were gas stations there but most of them weren't open.

So, we saw this gas station on our left, the one we tried to pull into. As I say, we had to wait until the traffic cleared.

So when the traffic cleared, Joe started to pull into the gas station and the fellow sitting next to me on my right, Joseph Purcell, he yelled to look out and at that, I turned around and all I remember is this big blinker going on and off, this yellowish-orange blinker. Everything happened so fast. I tried to turn around to yell to Joe Rivera to look out but before I could even do anything, the truck hit us. And as the truck hit us, at the same moment, Joe Purcell on my right, who hollered, "Look out," he turned away from the truck. As he turned, he pulled up his knee and I turned to tell Joe Rivera to look out and when the truck hit us, Joe Purcell's knee hit me in the back and my chest hit the steering wheel. Joe Rivera shot out and the next thing I knew, the police were there and an ambulance.

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MR. ZITOMER: Your Honor, I would like to offer in evidence something which is in the record.

(Court jacket was handed to counsel.)

MR. ZITOMER: With the Court's permission, I would like to withdraw the photographs which are appended to the deposition of John E. Willis.

THE COURT: You may do so.

(Counsel removed photographs from Court jacket.)

THE DEPUTY CLERK: Plaintiff's Exhibits 1-A through -F, for identification.

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(Plaintiff's Exhibits Nos. 1-A through 1-F for identification were admitted in evidence.)

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BY MR. ZITOMER:

Q. Mr. Williams, you referred during your testimony to the blinking light of the truck which you saw just at the time of the collision.

A. That is right.

Q. Would you take this crayon and draw a circle around the light that you are referring to on the truck? A. Just on this copy?

Q. No, do it on all of them. A. (Complied.)

THE COURT: I assume that the witness is making identifying marks on Plaintiff's Exhibits 1-A through -F. Is that correct?

MR. ZITOMER: That is correct, Your Honor.

BY MR. ZITOMER:

Q. Now, Mr. Williams, can you tell us the color of the light that you saw on this fender? A. It was yellowish orange.

Q. At what distance did you actually see this light flashing?

A. Right on top of me.

Q. When you say on top of you, what do you mean? A. Joe Purcell yelled, "Look out." I turned around and looked out the window and it looked like it was right outside the window.

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29 CROSS-EXAMINATION

BY MR. STEWART:

Q. Mr. Williams, as you and the other men in the car were traveling from the Jersey City area to Washington on June 1, did you have occasion to drive this car yourself? A. Yes, I did.

Q. And had you just shortly before this accident turned over the driving to Mr. Rivera? A. I am not sure whether it was myself or Joe Purcell that did; I don't remember.

Q. Well, when you were driving the car on this trip, was it raining at that time? A. I think it was drizzling when I started. I think it had
30 just started. In other words, further north, it wasn't actually raining when we started out.

Q. Of course, it was raining hard as you neared Washington and neared the area where this accident occurred? A. Yes, sir.

Q. Did you have the defroster on or blowers on in the car?
A. Yes, they were.

Q. Are you sure of that? A. Maybe I shouldn't say that. I am not sure but I can say that I was looking out of the window and it wasn't foggy.

Q. What window did you look out of? A. Well, I was sort of facing sort of to the left front, more or less. In other words, I was looking, say, on the left side of the street where the gas station would be as we were approaching it over on this side, on that angle.

Q. Were the windows up? A. I beg your pardon, I didn't hear you.

Q. Were the windows up? A. I don't remember.

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49 ALLAN L. NAIRN

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ZITOMER:

Q. State your full name and address, sir. A. Allan Nairn, 5629 Ridgemore Road, College Park, Maryland.

Q. Officer Nairn, are you now a member of the Metropolitan Police Force? A. Yes, sir, I am.

Q. Were you so on June 1st, 1958? A. I was.

Q. Were you at that time attached to the Accident Investigation Unit? A. I was, yes, sir.

50 Q. In the performance of your duties, sir, did you have occasion to investigate an accident that occurred at 16th and New York Avenue on June 1st, 1958? A. Yes, sir, I did.

Q. Is that one involving the Rawlings Truck Line and the vehicle in which the plaintiff here was riding? A. Yes, sir, it was.

Q. Now, Officer, can you use this blackboard to make a freehand sketch of that intersection from your notes? A. Yes, sir.

Q. Will you do this. A. (Complied.)

Q. Officer, would you mind drawing an arrow at the top and pointing the arrow towards the center of the city? A. (Complied.)

Q. That arrow would point in the direction where a car would go if you were entering the city from Maryland? A. That is correct.

Q. Will you label the streets, please? A. (Complied.)

Q. Officer, how wide is New York Avenue at that point? A. New York Avenue is 52 feet.

51 Q. Will you draw that measurement in on the left-hand side, showing the width? A. (Complied.)

Q. At that hour, that is 10 p.m. on June 1st, 1958, how many lanes of traffic were there going out of the city? A. Going east or going out of the city, there were three lanes.

Q. And how wide, sir, is each lane? A. Approximately ten feet six inches.

Q. Now, could you then draw in the approximate dividing line between the inbound and outbound traffic? A. (Complied.)

Q. How many lanes of traffic were there at that time going inbound into the city? A. Two.

Q. Officer Nairn, when you arrived at the scene of the accident, what did you find? A. When I arrived, I found a tractor trailer that had been in collision with a 1950 Mercury sedan.

Q. Could you fix the point of impact? A. No, sir, I can't. The point of impact was pointed out to me.

Q. What was that? A. Approximately in this location (indicating), approaching the driveway to an Amoco gasoline station.

52 Q. Could you draw in the Amoco gasoline station, making a rectangle, Officer Nairn? A. (Complied.)

Q. Are those two gaps you have left there the two driveways to the Amoco station? A. Yes, sir, they are.

Q. Now, could you erase that first "X" that you put in there? A. (Complied.)

MR. ZITOMER: I think the record should show, Your Honor, that he has erased an "X" he had put on at 16th rather than at the driveway.

BY MR. ZITOMER:

Q. Now, can you make that "X" a little larger, please? A. (Complied.)

Q. What is that place that you have just marked? A. That is a point of impact pointed out to me by the gasoline station attendant at the Amoco station, which was 16 feet east of this west driveway and three feet north of the south curb of New York Avenue.

Q. Could you write those figures down in the upper right-hand corner? Is that three feet north of the south curb?

THE COURT: The witness has so testified.

53 BY MR. ZITOMER:

Q. Now, could you ascertain the — May I show you these photographs which have already been introduced in evidence, 1-A through 1-F. Are these the two vehicles that were involved in the collision? A. Yes, sir, they are.

Q. Do they show accurately the respective damage to the vehicles? A. Yes, sir, they do.

Q. Did you have a chance to see them in this position? A. Yes, I did.

Q. Now, did you interrogate the operators of both vehicles? A. Yes, sir, I did.

Q. What was told to you by the operators?

MR. STEWART: I object to the question, Your Honor. I have no objection to the officer testifying as to what Mr. Willis, the operator of the Rawlings Truck Line, said but I object to his testifying as to anything Mr. Rivera said.

THE COURT: I believe any statement of Rivera would be hearsay in the present posture of this case. You may rephrase your question.

BY MR. ZITOMER:

54 Q. When you interrogated the two drivers, was this all done in the presence of each other and yourself? A. Yes, sir, it was.

Q. Now, would you tell us what the drivers said to you?

MR. STEWART: I make the same objection, Your Honor.

THE COURT: The objection is sustained.

BY MR. ZITOMER:

Q. Now, Officer, would you tell us what the operator of the truck said? A. The operator of the truck stated that he was going east on New York Avenue, that he had passed a truck that was parked just west of the intersection of 16th Street, that he passed the truck and he had his right turn signal on to come back into the curb lane. When he was about 15 feet away, this Mercury made a left turn in front of him and the collision occurred.

Q. Do you know what signal he was referring to that he had on? A. The right turn signal.

Q. Is that the same right turn signal that is encircled on these photographs in red crayon? A. Yes, sir. This is the signal here (indicating).

55 Q. Did the truck driver say how far before the point of collision he saw the automobile? A. He stated about 15 feet.

Q. Did he state where the vehicle was at the time he first saw the automobile? A. I asked him where he was when he first saw the automobile and realized there was danger, and he stated about 15 feet when the Mercury turned in front of him.

Q. Were you able to ascertain the condition of the driver, Joe Rivera, at the time of your interrogation? A. As to what?

Q. Well, as to his emotional state? A. I don't remember anything unusual about his actions.

Q. Do you recall how long after the collision you arrived at the scene? A. I arrived there approximately 20 minutes later.

Q. Did you see Williams at the scene of the accident? A. No, sir, I did not.

Q. Do you know what had happened to him before you arrived? A. I received information that he had been transported to a hospital.

MR. ZITOMER: That is all.

56 THE COURT: Do you have any questions?

MR. STEWART: If I may, if Your Honor please.

CROSS-EXAMINATION

BY MR. STEWART:

Q. What time did you arrive on the scene, Officer? A. Approximately 10:20.

THE COURT: This is p.m.?

THE WITNESS: P.m., sir.

BY MR. STEWART:

Q. Even as of the moment you arrived, Mr. Williams had already

been transported away? A. Yes, sir, he had.

Q. What is the speed limit in the area which we are discussing, Officer?

THE COURT: What was the speed limit in 1958?

MR. STEWART: Thank you, Your Honor.

BY MR. STEWART:

Q. What was the speed limit on June 1, 1958? A. Thirty miles per hour.

Q. Now, Officer, not meaning to be critical in any sense but it would appear to me that the "X" mark which you have placed on the board is in part within the driveway leading into that Sunoco gas station. You do not mean to indicate by that mark that the impact occurred at a point

57 south of the south curb line, do you? A. No, sir. The point is erroneously drawn there. It is three feet north of the south curb of New York Avenue.

Q. Was it still raining when you arrived, Officer? A. Yes, it was.

Q. This is a heavily traveled section of Washington, particularly on weekends? A. Yes, sir, it is.

MR. STEWART: Thank you, sir.

THE COURT: Any questions?

MR. SCHROEDER: No, Your Honor.

THE COURT: Is there any redirect examination?

MR. ZITOMER: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. ZITOMER:

Q. What do you mean with respect to the point of impact, is that the point at which the right front fender of the truck was in contact with the automobile? Would that show the right front portion of the truck, or what portion of the truck? A. That would show the right front fender. As I said before, that was pointed out to me by the gas station attendant.

58 Q. If that "X" representing the position of the vehicles in the photographs, would it not appear that the front part of the vehicle was on the driveway?

THE COURT: The front part of which vehicle?

MR. ZITOMER: Of the automobile.

THE COURT: By automobile, you mean the Mercury?

MR. ZITOMER: Yes, sir.

THE WITNESS: I believe so, the front part was partly in the driveway. Yes, sir.

MR. ZITOMER: Your Honor, there is one point I would like to raise which I omitted on direct examination. May I have the Court's permission to ask him one question which I omitted on direct examination?

THE COURT: Very well.

BY MR. ZITOMER:

Q. Did you ascertain the license registration on the Mercury?

A. Yes, sir. He had a registration certificate.

Q. And that license registration, what state was it registered in?

A. In the State of New York.

Q. What was the registration number? A. It was VB 2261.

Q. Did you have occasion to examine any credentials with respect to the ownership, Officer? A. Yes, sir, I did.

59 Q. What did you examine? A. Mr. Rivera produced a registration certificate from the State of New York. The face of the certificate was typewritten with the name "Harry Goldberger", with an address of Bronx, New York. On the rear of the certificate was a transfer notice with the handwritten name of Rivera and his address in Bronx, New York, also signed by Harry Goldberger.

Q. The number on the license plates, did that correspond, then, with the identification of Goldberger or to Rivera? A. The registration card had the tag number VB 2261 on the face of the certificate and was registered to Harry Goldberger. On the rear, it was transferred to Rivera.

MR. ZITOMER: Thank you.

THE COURT: Any further questions?

MR. SCHROEDER: No, Your Honor.

THE COURT: Mr. Stewart?

MR. STEWART: Yes, Your Honor.

RECROSS-EXAMINATION

BY MR. STEWART:

Q. Officer, these photographs which you have before you depict the position of the vehicles after they came to rest following this acci-

60 dent as distinguished from any suggestion that they depict the vehicles at the time and position of the impact; is that correct? A. These photographs were taken by the Armed Service Police. They were taken after the accident.

Q. And prior to any movement of the vehicles once they came to rest following the impact, is that your understanding? A. These are photographs of the vehicles as they came to rest.

Q. When they came to rest after the impact? A. That is correct.

Q. They are not pictures in a position at which you have marked the point of impact? A. No, sir, they are not.

MR. STEWART: All right, sir. Thank you.

RECROSS-EXAMINATION

BY MR. SCHROEDER:

Q. Officer Nairn, did Mr. Rivera also have a receipt for payment of this vehicle with him? A. Yes, sir, he did.

Q. Did you examine that? A. Yes, sir, I did.

61 Q. And was that also signed by Mr. Goldberger? A. It was written in longhand, a receipt for a certain amount of money for the sale of a 1950 Mercury.

MR. SCHROEDER: Thank you.

FURTHER REDIRECT EXAMINATION

BY MR. ZITOMER:

Q. Do you know the date of that, Officer? A. No, sir, I do not.

Q. Have you ever seen it again? A. No, sir, I have not.

MR. ZITOMER: Thank you.

THE COURT: Are there any further questions?

MR. STEWART: No, Your Honor.

THE COURT: You may step down, Officer. You may be excused.

(The witness left the stand.)

THE COURT: We will at this time, ladies and gentlemen of the jury, take a brief recess. Remember that you should not discuss the facts in the case with anyone during the recess.

(Whereupon at 3:07 p.m., a recess was taken.)

THE COURT: You may call your next witness.

MR. ZITOMER: If Your Honor please, may we approach the Bench?

THE COURT: You may.

62 (At the Bench:)

MR. ZITOMER: Your Honor, I want to read to the jury the testimony of John Edward Willis, the defendant, given on the deposition in this case and on file with the Court, those portions which I have marked out. This is not all of it. This represents approximately half of it.

THE COURT: The testimony of the defendant Willis, John Edward Willis?

MR. ZITOMER: Yes, sir.

THE COURT: Why do you not call him to the stand?

MR. ZITOMER: I felt this makes an easier presentation. If necessary, I could follow up with live testimony. I felt it is easier to present this in a more orderly fashion by reading it.

THE COURT: I don't understand why you are reading the deposition when the witness is available to testify as to facts.

MR. ZITOMER: The rules say that depositions may be used if you want to read the deposition for impeachment. He is an adverse party. I have the right to cross-examine him.

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64 JOHN EDWARD WILLIS

called as an adverse witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ZITOMER:

Q. Your name is John Edward Willis, is it? A. Yes, sir.

Q. And your home, sir, is in Wakefield, Virginia? A. Warfield, Virginia.

65 Q. Warfield, Virginia. A. That is right.

Q. Where is that, sir, with respect to the town of Emporia, Virginia? A. It is 25 miles southwest of Emporia.

Q. Now, on June the 1st, 1958, you were then employed by the defendant Rawlings Truck Line, Inc. as a driver? A. Yes, sir.

Q. And on that day, did you pick up a truck at Emporia, Virginia, at about 4:30 in the evening? A. Yes, sir.

Q. And is that the same truck, sir, with which you were involved in an accident at 16th and New York Avenue? A. Yes, it was.

Q. Now, that truck, so far as you could tell, was in good operating condition, was it not? A. Yes, sir.

Q. It had windshield wipers that worked effectively? A. Yes, sir.

Q. And when they were on, they cleaned your windshield, wiped clean, did they? A. Yes, sir.

Q. When it was raining and you turned your windshield wipers on, you could see without any difficulty? Let's say, your windshield wipers

66 did operate normally? A. They operated normally.

Q. If there was any defect in them, you just tell us. A. No defect.

Q. You had a horn on your vehicle also? A. Yes, sir.

Q. Was that operating properly? A. Yes, it was.

Q. Now, the turn signals on your vehicle, you had two of them on either fender, did you not? A. Yes, sir.

Q. Your right front fender and left front fender. Are those the same turn signals that are shown in the photographs that have been marked

in evidence? I think you were shown these at a deposition once. A. Yes. (Perusing exhibits.)

Q. What color are those turn signals when they are lighted? That is, what color were they on June the 1st, 1958? A. They were yellow.

Q. Sir? A. Yellow.

Q. And when that light is on, is it a blinking light? A. Yes, sir.

67 Q. When you are driving your vehicle, if the light is on, either one of the turn signals is on while you are operating the vehicle, can you see the lights from your driver's position? A. Yes, sir.

Q. In other words, it is not like an automobile where you can't see the signal light when it is on except on the dashboard, but you can actually look down and see whether or not your lights are blinking? A. That is right.

Q. In addition to that, the signal makes a clicking noise inside the car, does it not? A. Yes, sir.

Q. And you have a little lever that you push up and down? A. Yes, sir.

Q. If you want to make a right turn, you push the lever up? A. Right.

Q. And if you want to make a left turn, you push the lever down? A. Yes.

Q. Does this lever automatically snap back after you make the turn?

68 A. No, sir.

Q. In that respect, it is a little different from an automobile, isn't it? A. Yes, sir, it is.

Q. Now, on June the 1st, 1958, Sunday, you drove from Emporia to Washington, D. C. without making any stops except at Fredericksburg, Virginia? A. That is right, one stop.

Q. And when you made that stop, you made it only for the purpose of making a telephone call at Fredericksburg? A. That is right.

Q. You did nothing else in Fredericksburg? A. Probably ate a sandwich or drank a coke, something like that.

Q. At what time would that be? A. I would say 7 or 7:30.

Q. Now, you then proceeded from Fredericksburg to Washington non-stop, that is, except for your traffic lights, but you didn't get out of your vehicle? A. No, sir.

Q. Nor did you turn your motor off? A. No, sir.

Q. Until you came to New York Avenue in the city of Washington, is that right? A. That is right.

69 Q. Is it correct you went up Third Street, N.W., in the city of Washington? A. Yes, sir.

Q. And when you got to New York Avenue, you made a right turn, did you? A. That is correct.

Q. When you made your right turn on New York Avenue, what lane of traffic did you stay in on New York Avenue? A. Right lane.

Q. Did you remain in the right lane? A. I remained in the right lane until I had to pull out to pass a car.

Q. Where was this vehicle that you said you had to pull out to pass? A. It was parked on New York Avenue by a cafeteria just before I approached 16th Street.

Q. Now, you mentioned a cafeteria. Are you familiar with that cafeteria? A. Yes, it were.

Q. Pardon? A. Yes, it were.

Q. Did you know at the time you were going up New York Avenue there was a cafeteria there? A. Yes.

70 Q. Incidentally, had you had dinner yet? A. Yes.

Q. You had had dinner? Where? A. Fredericksburg.

Q. Where? A. Fredericksburg, Virginia.

Q. Didn't you say you had a sandwich at Fredericksburg?

THE COURT: This is repetitious. The witness has so testified.

BY MR. ZITOMER:

Q. Now, where is the cafeteria in relation to the intersection of 16th and New York Avenue? A. I would say a quarter of a block west of the intersection of 16th Street.

Q. Would you come down here, sir, and make a mark, point an

arrow in the direction of the cafeteria or draw it on there? A. (At the board) I would say this is the cafeteria, right here (indicating).

Q. You may resume the stand, sir. A. (Complied.)

71 MR. ZITOMER: Let the record show that he has drawn a circle with an "X" just south of the south curb of New York Avenue.

BY MR. ZITOMER:

Q. Now, when you approached the intersection of 16th Street, was it your intention to make a right turn into 16th Street? A. No, sir, it wasn't.

Q. When you approached that intersection of 16th Street, was it your intention to make a turn in the immediate future, that is, either at 16th Street or within the next hundred yards? A. No, sir.

Q. Were you looking for any place? A. No, sir, I wasn't.

Q. Could you show where this truck was which you say you passed? Does it show on that map or would it be off of the map?

THE COURT: By "map", you mean the drawing on the board; is that correct?

MR. ZITOMER: The drawing on the board, yes.

THE WITNESS: It was right in front of the cafeteria.

BY MR. ZITOMER:

Q. Right in front of the cafeteria. A. That is right.

72 Q. How far back was this truck from the corner of 16th Street? A. I would say a quarter of a block past the cafeteria.

Q. Incidentally, had you ever stopped at this cafeteria before?

THE COURT: I don't see the materiality.

BY MR. ZITOMER:

Q. What was that distance you said?

THE COURT: The witness said a quarter of a block.

BY MR. ZITOMER:

Q. About a quarter of a block. Now, when you went — you say you then went into the right-hand lane of traffic? A. I pulled out to the left-hand lane to pass a vehicle and turned off my signal after I got back in the right-hand lane.

Q. Did you get the vehicle back into the right-hand lane? A. Yes, sir.

Q. How long were you in the right-hand lane before the collision? A. It wasn't long. I was riding straight down my lane.

73 Q. Well, had you just straightened out or were you still in the process of moving to the right? A. I was straight.

Q. Had you just completed it at the time of the collision, or had you been straight for sometime? A. I was straight for a short time.

Q. About how long would you say? A. I would say not much over two or three minutes.

Q. How far would you have gone during that time? A. The distance from the cafeteria to the intersection which I was approaching.

Q. What is that distance, do you know? A. Quarter of a block, I would say.

THE COURT: We will suspend this hearing at this time until tomorrow morning.

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74 Friday, January 24, 1964

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75 JOHN EDWARD WILLIS

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DIRECT EXAMINATION (Resumed)

THE COURT: You were questioning the witness at adjournment on the duration or period in which he was in the right-hand lane. He stated two or three minutes he had gone to the intersection in the right-hand lane. This was about a quarter of a block.

You may proceed.

BY MR. ZITOMER:

Q. Mr. Willis, you recall giving the deposition on February 24, 1960? A. Yes, sir.

Q. And at that time, do you recall that you had counsel present and that it was in the offices of your lawyer? A. Pardon me?

Q. Do you recall that you had a lawyer present? A. Yes, sir, I do.

Q. Now, do you remember testifying with respect to your being in the right-hand lane as follows: You said –

76 THE COURT: From what page are you reading?

MR. ZITOMER: At page 22, Your Honor.

THE COURT: Go ahead. State your question to the witness.

BY MR. ZITOMER:

Q. The question was beginning at the middle of page 22: "How many minutes passed from the time that you turned your right turn signal off until the time of the collision?"

Do you recall that you answered, "I don't know."

Is that still your testimony, or is it different? A. It is still, I don't know.

Q. Then, the question was put to you, "How many blocks did you travel? Did you travel as much as half a mile after turning the right turn signal off?"

Do you remember giving the answer, "I would it wasn't quite a half a mile."

Is that correct? A. Yes.

Q. The next question was, "Would it be, then, between a quarter of a mile and a half a mile?"

And you answered, "Something like that." A. That is correct.

Q. Now, is it your testimony, then, that you were in fact between a quarter of a mile away and a half a mile away from the point of collision

77 when you turned your signal off? A. Quarter of a mile.

Q. Yes, sir. Now, that cafeteria is not a quarter of a mile away, is it?

THE COURT: This is repetitious. You asked the witness yesterday how far the cafeteria was.

BY MR. ZITOMER:

Q. Now, when you first saw the Mercury, that is, the automobile that you were in collision with, where was it in the highway? A. It was right across in front of me when I seen it.

Q. Do you recognize the diagram the police officer drew up here? A. Yes, I do.

Q. Can you draw a rectangle showing where that automobile was when you first saw it? A. Yes, sir.

(At the board. The witness drew a line on the board.)

BY MR. ZITOMER:

Q. Well, now, you have drawn a line just above and to the right of the "X". Does that line represent the position of the automobile when you first saw it? A. That is right.

78 Q. Now, I understood from your testimony, then, that you never saw the vehicle pass from the center of the road — I am using the middle line the officer drew as the dividing line. You never saw the front of the vehicle move across the center line to the point of the "X"? You never saw the vehicle move that distance? A. No, sir, I did not.

Q. How far away were you from the automobile when you saw it for the first time? A. About 15 feet.

Q. It wasn't over 15 feet, was it? A. No, sir.

THE COURT: The witness said 15 feet. Don't ask argumentative questions.

BY MR. ZITOMER:

Q. The reason I put that question to you is because on deposition at page 24, the same deposition I referred to, the question was put to you in the middle of the page, "How far was the Mercury from you when you first saw it?" and your answer was, "About 10 or 15 foot."

THE COURT: What is your question to the witness?

BY MR. ZITOMER:

Q. Now, is that still your testimony, that it was about 10 or 15 feet? A. That is correct.

79 Q. Now, you heard the police officer testify to the distance across this road, did you not? He gave a distance of 10 and a half feet for each of three lanes across this highway. A. Yes, sir.

Q. And this bottom end of the line which you drew would represent about the position of the front of the vehicle? A. Yes, sir.

Q. Now, the distance, then, from this center line to the front of that vehicle is a distance of over 30 feet, isn't it?

THE COURT: I believe this is just a question of arithmetic.

MR. ZITOMER: Well, I wanted the witness' estimate of that, Your Honor.

THE COURT: I don't see that it has any value.

BY MR. ZITOMER:

Q. Now, as you were proceeding down the highway, as you say, you were in the right-hand lane. There was no traffic immediately near you, was there? A. There was some coming on beside me and facing south.

80 Q. But between you and that automobile, there was no traffic in front of you for at least 75 feet; is that correct? A. That is correct.

Q. As a matter of fact, you testified earlier that the vehicle that was ahead of you, 75 feet ahead of you, was in the right-hand lane.

A. That is right.

Q. And then there was another vehicle further ahead of you in the lane to the left of that, still going in your direction? A. That is right.

Q. So there was nothing between you and that automobile?

THE COURT: This is repetitious.

BY MR. ZITOMER:

Q. When you first saw the automobile, did it have its headlights on? A. Pardon?

Q. When you first saw the Mercury automobile, did it have its headlights on? A. Yes, sir.

Q. Now, yesterday you testified that you had had a sandwich at Fredericksburg, Virginia. Do you recall your testimony on that yesterday?

81 THE COURT: The witness did so testify.

BY MR. ZITOMER:

Q. Do you recall, Mr. Willis, again referring to your deposition on page 9, "How far did you go to pick up Route 301 from Emporia?"

And you answered, "Right through Emporia." A. That is correct.

Q. Then the question was, "You took 301 through Richmond, is that right?"

THE COURT: I don't see the materiality of these questions.

MR. ZITOMER: Your Honor, I am trying to lead up. I don't want to be unfair to the witness by taking these questions out of context. I am simply trying to give the whole context of the question. If Your Honor wishes, I will go directly to the point.

THE COURT: I think it would be desirable.

MR. ZITOMER: Yes, sir.

BY MR. ZITOMER:

Q. Now, the question was put to you and you stated in the middle of the page 9, "I stopped at Fredericksburg." I asked you what you stopped there for and you answered, "I stopped there and made a phone call."

82 The next question was, "What time was that?" And continuing on page 10, "What time was it when you stopped at Fredericksburg?"

You answered, "I don't know the exact time, what time it was."

The next question was, "Then how long did you stay at Fredericksburg?"

And your answer was, "Oh, I didn't stay no more than ten minutes."

The next question was, "Then what did you do?"

Your answer was, "I got in my truck and went on to Philadelphia."

THE COURT: What is your question to the witness?

BY MR. ZITOMER:

Q. Was it during that ten-minute period, sir, that you ate? A. I ate a sandwich during that time.

Q. Was it during that ten-minute period? A. That is right.

Q. During that same period of time, you made a telephone call at Fredericksburg, some personal business? A. Yes, sir.

Q. And you didn't mention that in your deposition, did you?

83 MR. STEWART: I object, Your Honor.

THE COURT: Your objection is sustained.

BY MR. ZITOMER:

Q. May I ask you, sir, when I asked you on the deposition why you stopped there and you said you stopped to make a telephone call, was that your purpose? A. That is right.

Q. Now, sir, do you recall on page 14 of your deposition, the question which proceeds as follows: "Did you make any stops for gasoline?"

Your answer, "No, I didn't."

Question, "Did you make any stops for supper?"

Your answer was, "No."

Now, do you mean by that that the sandwich wasn't supper? A. That is right.

Q. Well, the very next question is, "You had nothing to eat or drink from the time you left your house?"

Your answer was, "No, I hadn't."

THE COURT: What is your question to the witness?

BY MR. ZITOMER:

Q. Is that correct, what you said at the time of your deposition, that you had neither supper nor anything to eat or drink from the time you left your house to the time you had the collision? A. I had a sand-
84 wich at Fredericksburg.

Q. May I ask you, sir, why you didn't say so at the time of the questions which I have just read to you?

MR. STEWART: I object to the question, if Your Honor pleases. He is arguing with the witness now.

THE COURT: I think the question is a proper one.

Answer the question.

THE WITNESS: Well, I couldn't recall all those incidents at that time.

BY MR. ZITOMER:

Q. Well, this was in 1960 —

THE COURT: Don't argue with the witness.

BY MR. ZITOMER:

Q. You mean your recollection is better today that it was back in 1960? A. No, I don't think so.

Q. You have done something, then, to refresh your recollection in this one incident? A. No, sir, I haven't.

MR. ZITOMER: Your Honor, he may have testified to this yesterday but I just want to get his speed from him. If I asked it yesterday, I don't have it in my notes.

THE COURT: Ask your question.

BY MR. ZITOMER:

85 Q. Mr. Willis, what was the speed of the Mercury when you first saw it in that position that you have drawn it? A. Between five to ten miles an hour.

Q. What was your speed at that time? A. That was my speed I am speaking of.

Q. Sir? A. That was my speed I am speaking of.

Q. You were traveling at five to ten miles an hour when you first saw the Mercury? A. That is right.

Q. How fast were you traveling when you approached the corner of 16th Street, that is, before you crossed 16th Street? A. From 20 to 25, I would say.

Q. Then as you reached the corner of 16th Street,you slowed down to five or ten miles an hour? A. I seen this car coming across the way and I slowed up some.

Q. Now, you testified that you first saw this car when it was 10 or 15 feet away from you --

THE COURT: This is repetitious.

BY MR. ZITOMER:

Q. Well, I am trying to find out before you saw the Mercury, what was your speed? Just before you saw the Mercury, what was your speed?

86 A. I was driving between 20 and 25 or less because of the street, it was wet.

Q. Well, was your speed, then, just before sighting the Mercury 20 to 25 miles an hour? A. It could have been less.

THE COURT: No. Don't say what it could have been. The question is, was it? If you don't know, say you don't know.

THE WITNESS: Well, I don't know.

BY MR. ZITOMER:

Q. Could you have been slowing down as you approached that intersection?

THE COURT: I don't think the question is "could you have been"; I think the question is what was done. These are speculative questions. Speculative answers have no value.

BY MR. ZITOMER:

Q. Now, do you still work for the trucking company? A. Yes, sir.

Q. How long have you been working for the company? A. Going on six years.

Q. Do you intend to continue working —

THE COURT: I don't see that it is material.

87 MR. ZITOMER: Thank you. That is all.

THE COURT: Do you have any questions?

MR. STEWART: Yes, if I may, Your Honor.

CROSS-EXAMINATION

BY MR. STEWART:

Q. Mr. Willis, did you yesterday morning visit the scene of this accident with me? A. Yes, sir.

Q. Did you at that time associate the parked truck with the cafeteria and observe the location of the cafeteria? A. Yes, sir.

MR. STEWART: I have nothing further at this time of this witness, Your Honor.

THE COURT: Do you have any questions?

MR. SCHROEDER: No, Your Honor.

THE COURT: Is there further examination?

MR. ZITOMER: No, Your Honor.

THE COURT: You may step down.

(The witness left the stand.)

MR. ZITOMER: Your Honor, I would like at this time to offer the traffic regulations.

THE COURT: You may come to the Bench.

(At the Bench:)

THE COURT: What sections are you offering in evidence?

88 MR. ZITOMER: The sections detailed in the pre-trial order.

THE COURT: The record doesn't indicate what is in the pre-trial order. What sections are you offering?

MR. ZITOMER: Sections 99c, 22a; 39b; 146c and d; 47a; 39a; 21a; 132b; 36; 40a; 143; 47a and b —

THE COURT: You have offered them before.

MR. ZITOMER: Yes, 47b in addition to 47a; and Section 38.

THE COURT: Is that all?

MR. ZITOMER: Yes, sir.

THE COURT: Is there any objection to the admission in evidence of Section 21a of the Traffic Regulations?

MR. STEWART: There is no evidence —

THE COURT: Is there an objection?

MR. STEWART: Yes, Your Honor.

THE COURT: State your objection.

MR. STEWART: Your Honor, may I impose on the Court and look at your regulations?

(Short pause in proceedings.)

MR. STEWART: There is no evidence whatsoever to support the contention of reckless driving in this case.

THE COURT: What do you say to the objection?

89 MR. ZITOMER: The language "carelessly and heedlessly in willful or wanton disregard of the right or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property." There is evidence from the defendant himself that he failed to observe this automobile when it traveled a distance of 32 feet. The inference would be that it didn't travel in a straight line. His failure to observe the car for at least 60 feet is one item of evidence. Of course, with respect to the driver of the Mercury, we have evidence of it turning at a time, apparently, when it was dangerous to do so.

My other point is, of course, under the circumstances, maybe other sections deal with it but this section also deals with speed under the circumstances and under these particular circumstances of traffic indicating a turn in front of him and conditions of the weather and his own signal. The jury might conclude it was a violation of this section as well as some others.

THE COURT: Do you desire to be heard with respect to this section?

MR. SCHROEDER: I have nothing further to add other than what Mr. Stewart said.

THE COURT: I will admit Section 21a only insofar as it is applicable to the defendant Goldberger.

90 MR. SCHROEDER: I don't know if I misunderstood it. I object. I just don't have anything further to say.

THE COURT: Very well.

Is there objection to 22a?

MR. STEWART: If that refers to speed, there is no evidence here that deals with the contention of speed.

THE COURT: What do you say to the objection?

MR. ZITOMER: The language of that paragraph says: "In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the street or highway in compliance with legal requirements and the duty of all persons to use due care."

THE COURT: Are you finished?

MR. ZITOMER: Yes, Your Honor.

THE COURT: The objection is sustained.

Is there any objection to the admission in evidence of Section — You have identified Section 36 as being offered in evidence without, as my notes show, giving any letter designation for that section. Do you have any paragraph in mind?

MR. ZITOMER: What I was interested in was the general rule with respect to making a left turn from the lane nearest to the curb.

91 THE COURT: Is there objection to Section 36?

MR. STEWART: Yes, Your Honor. This deals with turning at an intersection and this was not an intersection; the turn was not at an intersection.

MR. SCHROEDER: I join in that objection, Your Honor.

THE COURT: What do you say to the objection?

MR. ZITOMER: He is probably right, Your Honor.

THE COURT: The objection is sustained.

Is there any objection to Section 38?

I think it may assist the Court in evaluating whatever is said about this section if you would tell me to what factual situation you consider it applicable.

MR. ZITOMER: This applies to the situation of the Goldberger vehicle starting from a stopped position as it was waiting to make the turn. The Goldberger vehicle was stopped waiting to make a turn before it proceeded into the gas station.

THE COURT: Is there any objection to this section?

MR. SCHROEDER: Yes, Your Honor. I don't think the testimony is that the Goldberger vehicle was stopped. Even if you assume it was stopped, that section applies to parked cars or parked cars pulling out into traffic. There is a specific section which applies to making turns to the left.

92 THE COURT: I will sustain the objection to Section 38.

Is there objection to Section 39a?

MR. STEWART: Yes, Your Honor.

THE COURT: Just a moment.

(Short pause in proceedings.)

MR. STEWART: I object. Your Honor, I believe this likewise deals with a turn at an intersection and, therefore, is not applicable.

THE COURT: Doesn't it also deal with roadways, private roadways?

MR. STEWART: Yes, it does, Your Honor. It wouldn't be applicable as far as my clients are concerned.

MR. SCHROEDER: I don't think it is applicable to my client. I don't think there is any testimony as to whether a signal was given or was not given from that vehicle.

THE COURT: What do you say to the objection?

MR. ZITOMER: I am interested in the language relating to "move right or left upon a roadway unless and until such movement can be made with reasonable safety."

THE COURT: The Court will admit Section 39a as to the defendant Goldberger.

Is there any objection to Section 39b?

93 MR. STEWART: I don't feel that it is applicable to the defendant Rawlings.

MR. SCHROEDER: I object, Your Honor.

THE COURT: State the ground for your objection.

MR. SCHROEDER: On the basis there is no testimony that a signal was given or was not given on the Rivera vehicle.

THE COURT: What do you say to the objection?

MR. ZITOMER: This Section 39b is given principally with respect to the general law relating to the meaning of a signal and our evidence has shown and will show that the truck was making a right turn signal and under the law this would explain that this signal indicates the intention to make the right turn. There are other sections which deal more precisely with it but I think it is explanatory of that law.

THE COURT: The Court will sustain the objection to 39b.

Is there any objection to Section 40a?

MR. STEWART: I object. I don't think it is applicable to the defendant Rawlings.

MR. SCHROEDER: I object too, Your Honor. I don't think it is applicable to Rivera's vehicle.

94 THE COURT: What do you say is the evidence which makes Section 40a applicable?

MR. ZITOMER: The evidence again will show the truck driver was making a signal to make a right turn. As a result of the signal, the driver

of the automobile began to turn into the gasoline station. This is explanatory of what a yellow flashing light on the front fender was, if there is any doubt that a yellow flashing light on a vehicle such as this indicates an intention to make a turn. If it is conceded that a right flashing signal indicates the intention to make a right turn, then it wouldn't be necessary to read it.

THE COURT: The Court will sustain the objection to Section 40a.

Is there any objection to Section 47a?

MR. STEWART: Yes, Your Honor. That deals with a turn at an intersection.

MR. SCHROEDER: I join in that objection, Your Honor.

THE COURT: What evidence do you say justifies Section 47a?

MR. ZITOMER: The section is entitled "Vehicle Turning Left at or Between Intersections."

THE COURT: Section 47b pertains to between intersections. I repeat, what evidence do you say there is to support Section 47a?

95 MR. ZITOMER: I withdraw that section, Your Honor.

THE COURT: Very well.

Is there objection to 47b?

MR. STEWART: I object on the basis, if Your Honor pleases, that there is no showing that the vehicle operated by Mr. Rivera ever gave a signal of intention to turn.

THE COURT: Are you finished?

MR. STEWART: Yes, sir.

THE COURT: Do you have anything to add?

MR. SCHROEDER: No, Your Honor.

THE COURT: What do you say to the objection?

MR. ZITOMER: There is no evidence one way or the other because of the absence of Rivera at this time. The evidence shows the truck driver has seen the vehicle, the vehicle was in the process of making a left turn. The presumption of due care which normally attaches in the absence of evidence would indicate that the turn signal had been made.

THE COURT: I don't follow your reasoning, but I still think that Section 47b is admissible as to the defendant Goldberger. The Court will admit the section.

The next section tendered is 99c. Is there objection to Section 99c?

96 MR. STEWART: I object on the basis that there is no evidence to support the contention that the driver of the tractor trailer was in violation of this section.

MR. SCHROEDER: I say the same as to Rivera.

THE COURT: What do you say to the objection?

MR. ZITOMER: We have uncontradicted testimony that the automobile traveled a distance of not less than 32 feet and that he traveled this in the path of the truck; that the truck during the time the vehicle traveled 32 feet necessarily traveled twice that distance, that is, he necessarily traveled at least 75 feet and during this time, he does not see the vehicle at all; and there is a clear inference from the evidence that the truck driver was not giving due care to the road.

THE COURT: The objection to Section 99c is sustained.

Is there objection to Section 132b?

MR. STEWART: If Your Honor pleases, I object on the basis that there is no showing that there is any violation of this regulation by the tractor trailer driver. He has indicated that he did make use of this turn signal for the purpose of moving back from the center lane into the right-hand lane after passing a parked vehicle. There is no other evidence to the contrary. It is what was his intention, according to that regulation; not what was construed or may have been construed to be his intent by

97 some other motorist.

MR. SCHROEDER: As to Rivera, Your Honor, there is no evidence as to whether or not the light on his car was used or was not used. Therefore, I object to that section.

THE COURT: What do you say to the objections?

MR. ZITOMER: The regulation, I think, is quite clear in its application. It states simply that the lights when on indicate intention to make

a turn. The right turn signal was on, indicating intention to make a right turn. I think this section is applicable, Your Honor.

THE COURT: Is that Section 132b you are talking about?

MR. ZITOMER: Yes, Your Honor. It says: "for the purpose of indicating an intention to turn either to the right or left."

This section, if we are reading the same one, says: "Any motor vehicle may be equipped and when required by these regulations shall be equipped with lamps showing to the front and rear for the purpose of indicating an intention to turn either to the right or left." And then it goes on to explain what it means and particularly it says in the last sentence, "by flashing the light showing to the front and rear on the side toward which the turn is made."

98 This has special application to the light of the truck which was flashing.

THE COURT: I think that this section is intended to establish certain standards. There is no evidence in this case as to any violation of these standards. The objection to Section 132b is sustained.

Is there any objection to Section 143? I assume that it is Clause "a" of 143 that you are offering in evidence; is that right?

MR. ZITOMER: Yes, sir.

THE COURT: Is there any objection, then, to Section 143a?

MR. STEWART: I object to it on this basis: The testimony would indicate that the standard prescribed in the regulation has been met by the owner of the tractor trailer and that there is a horn present on his vehicle. Beyond that, the regulation, it seems to me, seems to be saying either/or as far as use of it or not. I don't feel that is applicable in the situation here.

THE COURT: Do you have anything to add?

MR. SCHROEDER: My objection is the same except I would add there is no evidence to show why Rivera should have used his horn. If he should do anything, he should use his signal. There is no reason why he should use his horn to make a left turn.

99 THE COURT: What do you say to the objections?

MR. ZITOMER: In our pleadings, we made it quite clear one of the elements of the negligence of the truck is its failure to give warning or a signal at the time when it should have seen the automobile about to make a left turn in the path of the truck. This section states that under circumstances of emergency, the horn was available to be blown for that purpose.

THE COURT: What does the evidence show about whether his horn was or was not blown?

MR. STEWART: There is no evidence that his horn was not blown.

THE COURT: Anything further?

MR. ZITOMER: I have nothing further, Your Honor.

THE COURT: There is no statement in the record to that effect. I will sustain the objection to 143a at this time.

Is there any objection to Section 146c?

MR. STEWART: As far as Rawlings is concerned, the only evidence is that the windshield wipers were working.

MR. SCHROEDER: There is no evidence as to Rivera's automobile, as to whether it was or was not working.

THE COURT: What do you say to the objection?

100 MR. ZITOMER: I maintain it was his duty to see the road ahead of him. His failure to see was caused by lack of due care or obstruction of vision in his car.

THE COURT: I will sustain the objection to 146c.

Is there any objection to 146d?

MR. STEWART: Yes, Your Honor. There is no evidence to support a contention that any portion of this regulation was violated.

MR. SCHROEDER: I make the same objection, Your Honor.

THE COURT: What do you say to the objection?

MR. ZITOMER: The same thing, Your Honor: The duty of the driver is to maintain his vehicle in good working order and free of obstructions. When a vehicle travels this distance in front of him and he

has no knowledge of its presence, it gives the implication or inference of lack of due care or there is an obstruction of vision. The duty is quite clear of the operator to maintain the road and his vehicle free of obstructions.

THE COURT: The Court will sustain the objection to Section 146d.

MR. ZITOMER: Your Honor, I think we have not discussed one part of a section.

THE COURT: What section is that?

101 MR. ZITOMER: Section 22c.

THE COURT: Are you offering Section 22c in evidence?

MR. ZITOMER: Yes, sir.

THE COURT: Is there objection to Section 22c?

MR. STEWART: Yes, Your Honor. There is no showing of any violation. In fact, the only evidence on the score as to the movement of the truck is that in approaching this intersection, his speed was reduced and was at a lower rate than existed.

THE COURT: Do you have anything to add?

MR. SCHROEDER: No, except I join in the objection, Your Honor.

THE COURT: What do you say to the objection?

MR. ZITOMER: I made the point earlier. I think that the failure of the truck driver to observe the vehicle directly in front of his truck under these conditions raises an inference of the violation of this section.

THE COURT: The Court will admit Section 22c as to both drivers. You have a further witness?

MR. ZITOMER: Yes, Your Honor, I have two witnesses. But before proceeding, I would like to either recall Mr. Willis to the stand or to read one question and answer from the deposition.

102 THE COURT: You may recall the witness if you desire.

MR. ZITOMER: Thank you, Your Honor.

(In open court:)

MR. ZITOMER: May Mr. Willis be recalled, if Your Honor please?

THE COURT: He may.

Whereupon,

JOHN EDWARD WILLIS

recalled as an adverse witness, having been previously duly sworn, was examined and testified further as follows:

FURTHER REDIRECT EXAMINATION

BY MR. ZITOMER:

Q. Mr. Willis, can you offer an explanation to the Court and jury as to why you didn't see the automobile as it crossed from the center line of that road to the point where you first saw it? A. The reason I didn't see it was I looked back through the rear view and looks on the side and when it rains, you look low on the road.

Q. Did you say you were looking through the rear view mirror at the time? A. No, I didn't say I was looking; I said I looked to the rear and to the side and looked low when it rains.

103 Q. To which side were you looking? A. Looking straight, low.

Q. You were looking low. How low were you looking, do you know? In other words, you were only observing the road 15 feet in front of you?

THE COURT: Don't testify.

BY MR. ZITOMER:

Q. I am asking you how far ahead of you could you see on the road? How far ahead of you were you observing? A. Well, I would say a considerable distance.

Q. So that you were sitting high on your vehicle. A truck is higher than an automobile? A. That is right.

Q. And when you looked down from that, you say you could see a considerable distance. Could you see 200 feet ahead of you on the road ahead of you? A. Yes, I could.

Q. Were you observing the road ahead of you for a distance of 200 feet? A. No, sir.

Q. What portion of the road were you observing at the time, in feet? A. I would say 30 to 35 feet.

104 Q. You were observing only 30 to 35 feet ahead of you? A. That is correct.

Q. Were you in fact looking straight ahead? A. Yes, sir.

Q. So that just immediately before the accident, your head was looking straight ahead and you were observing ahead of you 30 to 35 feet?

THE COURT: This is repetitious.

BY MR. ZITOMER:

Q. Now, when you observed the road 30 to 35 feet ahead of you — Incidentally, how is your vision, your eyes? A. Good.

Q. And when you look down at a road 35 feet ahead of you, you can't see any further than that; is that what you are saying? A. You can but at that time there was traffic.

Q. You testified that the nearest car ahead of you was 75 feet —

THE COURT: This, again, is repetitious.

MR. ZITOMER: Yes. I am trying to get an explanation of why he couldn't see traffic beyond 35 feet. I am trying to get an explanation.

THE COURT: You must confine your questions to the witness. I have repeatedly attempted to caution you not to ask the same questions over and over. You are making the record unduly long.

105 MR. ZITOMER: Your Honor, I am doing my best to try to get the facts from the witness. I am a little confused right now at his answers.

BY MR. ZITOMER:

Q. Mr. Willis, my question was — I am not trying to trick you or be unfair; I am simply asking you to tell the Court and jury why, when you observed the road only 35 feet ahead of you, why you couldn't observe the next 50 feet? A. I didn't say I couldn't see no further than that.

Q. Were you observing the next 40 feet after the immediate 35 feet in front of you? A. Yes, sir.

Q. And when you observed the roadway ahead of you, you observed the entire width of the traffic in your direction, didn't you? You have some peripheral vision. You can extend your hand out to your side and see your fingertips, can't you? A. Yes, sir.

Q. So, as you were looking straight ahead, you were able to view at the same time portions to the right and portions to the left of the area immediately ahead of you? A. That is right.

Q. Then as you approached the intersection of 16th Street, couldn't your peripheral vision, couldn't the edge of your eye even looking straight
106 ahead take in the view from the center line of New York Avenue dividing the two lanes of traffic all the way to the right-hand curb? A. Yes, sir.

Q. And would you say that your vision allowed you to see the width as well for a distance of 150 feet? A. Yes, sir.

MR. ZITOMER: Thank you.

THE COURT: Anything else?

MR. STEWART: I have no further questions.

THE COURT: Step down.

(The witness left the stand.)

* * * * *

107 JOSEPH JOHN PURCELL

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ZITOMER:

108 Q. Will you state your full name and address, please? A. Joseph John Purcell, 258 Maple Street, Secaucus, New Jersey.

Q. How old are you, Mr. Purcell? A. Twenty-five years old.

Q. What is your occupation? A. I drive for United Parcel Service.

Q. What do you drive, sir? A. A truck.

Q. Now, were you in the Marine Corps in June of 1958? A. Yes, I was.

Q. What part of the Marine Corps were you attached to? A. I was in Lehman Battery.

Q. Now, how many men were there in Lehman Battery? A. About 75.

Q. Was the plaintiff, David Williams, one of the men in your battery? A. Yes, sir.

Q. And when you say your battery, is this a unit of men that sleep and occupy the same room? A. Yes, one squadron.

Q. Do you know a Joe Rivera? A. Yes, sir.

Q. Incidentally, do you know where he is now? A. No, I do not.

109 Q. Have you heard from him? A. I haven't seen Rivera since I got out of the Service.

Q. How well did you know Joe Rivera? A. I was good friends with him. He stopped off at my house a couple times when we came up on week-ends, and I went on liberty with him quite often.

Q. Do you recall June the 1st of 1958, the day of the accident which is the subject of this suit? A. Yes, sir.

Q. Now, do you recall whether you saw Joe Rivera during the two weeks before that time? A. Yes, I saw Rivera. I had liberty with him a couple of times before within that two-week period.

Q. On occasions of liberty with Rivera, did he drive an automobile? A. No.

Q. How did you get around? A. We would take a bus to town to go and see a movie and eat, something like that.

Q. Now, on June 1st, 1958 — Was it the day before June the 1st that you came to New Jersey from Camp Lejeune? A. No, it was Friday, a couple days before.

Q. And when you came up, did Rivera drive? A. No.

110 Q. Now, did you go up with a group? A. Yes.

Q. And on the way back, that is in coming back, this was Sunday, June 1st? A. Yes, it was.

Q. When did you leave New Jersey area? A. That morning, Joseph Rivera called up my house and said that he had bought a car and that we could go back with him.

THE COURT: I believe this is hearsay. The question is what time did you leave.

THE WITNESS: We left in the afternoon about two or three o'clock, I guess.

BY MR. ZITOMER:

Q. Now, on the way back, you all drove together in the same car? A. Yes.

Q. Now, did you make any stops? A. Yes, we stopped a couple times for coffee and gas.

Q. Now, did any of you have anything to drink in the way of alcoholic beverages, beer, whiskey, anything like that? A. No.

111 Q. That Sunday? A. No, sir.

Q. When you stopped on the way, how long would these stops be? A. Enough to get gas and a couple cups of coffee.

Q. Now, when you approached Washington, D. C., were you in the right front seat of the car? A. Yes, I was.

Q. Will you tell us in your own words what happened as you came down New York Avenue that Sunday, June 1st? A. As we came down New York Avenue, he stopped in the left-hand side near the center line and there was traffic coming in the other direction. He waited until the cars went passed. There were cars coming down and he stopped there a minute or two –

Q. May I ask you to stop just a minute or two and I will ask you to mark on the diagram on the blackboard where he stopped.

I will show you the board and tell you something about it: This represents a Sunoco gasoline station here (indicating); this is 16th Street; this arrow is the direction towards Washington; this line is drawn by an officer to divide the traffic going inbound and outbound on this side; this is the two driveways to the Sunoco station.

112 I would like you to draw where your car came to a stop and draw a rectangle representing your car. A. (At the board) It stopped right here (indicating).

THE COURT: Keep your voice up.

THE WITNESS: It stopped right here.

BY MR. ZITOMER:

Q. Would you use this color crayon and –

THE COURT: No. We must use the black crayon on that board. We will have to use it in future cases also.

BY MR. ZITOMER:

Q. Just put your initials on the rectangle. We want to know who makes certain marks. A. (Complied.)

Q. That looks like a small triangle. Now can you draw a square or a rectangle representing the approximate size of the car? A. (Complied.)

Q. Now, you can resume your seat. A. (Witness resumed the stand.)

Q. Now, you say your car came to a stop. A. Yes.

Q. Now, what happened from that point? A. Well, we stopped and waited for the traffic to go passed. I was looking up New York Avenue and I saw a truck coming down in the other lane.

113 Q. When you saw this truck, was your car stopped or moving? A. It was just starting to move when I first saw the truck.

Q. Then what happened? A. He had his right-hand blinker on, and I would say he was approximately 100 feet past the corner of the 16th Street marked corner.

Q. You mean 100 feet away from the corner in the opposite direction? A. Yes.

THE COURT: Don't testify.

THE WITNESS: And he had his right-hand blinker on and I was watching him. As he approached the corner, it appeared to me he was slowing down and his wheels were starting to turn; and we were about half way through our turn and I had looked ahead towards the gas station. And when I turned back, I would say the truck was about 10 to 15 feet from us and I screamed, "Look out," and I tried to pull away from the door. Then we were hit and it pushed us back. We were pushed sideways and the blinker was going in the window right after we were hit. And the next thing I remember was the car stopped and Joseph Rivera was outside the car screaming, "I saw your blinker, I saw your blinker.

114 Why didn't you make the turn?" –

MR. STEWART: Objection, Your Honor. That is hearsay.

THE COURT: The objection will be sustained.

MR. ZITOMER: Your Honor, I submit this evidence as part of the res gestae. I would like to lay a foundation.

THE COURT: I cannot anticipate your questions. I cannot read your mind.

BY MR. ZITOMER:

Q. How long was it when you say Joseph Rivera jumped out of the car and screamed something? How long was this in relation to the accident itself? A. As soon as our car had stopped when we were pushed, as soon as our car came to a stop, he was half out of the door anyway and as soon as he got out, I heard him yelling –

THE COURT: No.

BY MR. ZITOMER:

Q. Don't say what he yelled. We are trying to get the manner in which he yelled, the manner and circumstances.

Now, at the time he yelled or screamed, where were you? A. I was still inside the car. I was lying on top of David Williams.

115 Q. Can you tell us how many seconds had elapsed from the time the car stopped until you heard Rivera scream? A. One or two seconds.

Q. Can you describe the manner in which he screamed? What was his emotional condition? A. He was cursing.

Q. How loud or soft was his voice? A. It was loud because I could hear him. It was very loud.

Q. Did anyone say anything to him that prompted him to make that statement? A. No, sir.

Q. Did you observe Joseph Rivera's emotional condition after you got out of the car? A. Yes, sir.

Q. What was it then? A. He was all excited and nervous.

Q. How could you tell he was excited and nervous? A. Well, he was jumping around. He looked like he was very nervous.

Q. Now, did he make the statement only once or did he make the statement more than once? A. A couple of times, he made it.

116 Q. Was this statement that you heard, was it in the form of an exclamation or was it like a message he was giving somebody? A. It was a statement.

MR. ZITOMER: Now, I would like for the record, Your Honor, to have that statement repeated as nearly as possible in the presence of the jury.

THE COURT: You may make a tender at the Bench, if you desire.

MR. ZITOMER: May I have the witness make that statement at the Bench?

THE COURT: You may not.

(At the Bench:)

MR. ZITOMER: The witness would state, Your Honor, that the statement was made excitedly and was stated as follows: "I saw your blinker. I saw your blinker. I saw your blinker" repeatedly in that fashion; that he was screaming at that time within seconds after the car came to a stop and he was screaming it at the truck driver. I submit this comes within the classic definition of res gestae if there is such a rule in this district.

THE COURT: Is there any objection to this statement?

MR. STEWART: Yes, there is. I say it is hearsay.

THE COURT: The objection will be sustained.

117 Your tender is a matter of record.

(In open Court:)

BY MR. ZITOMER:

Q. Now, I am going to ask you to come down to the blackboard and draw in several positions. First, draw in, if you will, approximately where the truck was when you first saw it. A. (At the board.) (Witness complied.)

Q. Now, will you put your initial on that? A. (Complied.)

Q. Now, I want you to write down, if you will, the actual distance as you know it from that corner of 16th Street to the front of the truck?

THE COURT: What was the distance? Why don't you ask the witness?

BY MR. ZITOMER:

Q. What was the distance? A. Approximately 100 feet.

Q. Will you write that in there? A. (Complied.)

Q. Now, I want you to draw a second diagram showing where the truck was when you saw its wheels start to turn? A. (Complied.)

Q. Now, will you put your initials there? A. (Complied.)

118 Q. And draw or write a "2" under your initials. A. (Complied.)

Q. Now, at position "2", I would like you to draw on the board where your automobile was in relation to the point of impact. If you will draw a dotted line showing the manner in which your car turned. A. (Complied.)

Q. Now, will you put your initials there and also "No. 2." A. (Complied.)

Q. Now, do you know the distance across 16th Street, that is the distance from that truck to the point where the accident occurred?

A. This here to here (indicating)?

Q. Yes. A. Well - (pause).

THE COURT: Do you know the distance? If you don't know, say you don't know.

THE WITNESS: I went back and measured it last night.

BY MR. ZITOMER:

Q. When you measured it, was the condition the same as it was as far as measurements? A. Yes, sir.

119 Q. Do you have those measurements with you? A. No, but I remember them.

Q. What were they? A. It was about 80 feet from where the car was here (indicating) to the point of impact.

Q. Do you know how wide 16th Street is? A. The street was about 38 feet; the sidewalk was about 15. To the middle of the driveway was another 16 feet.

Q. What was the speed of your car, the car that you were in in position 2, that is your position that you have last drawn? A. About 10 miles an hour.

Q. What was the speed of the truck at that time? A. The second time I saw him?

Q. Yes, sir. A. I would say about 20 miles an hour.

Q. What was his speed when you first saw it? A. About 25, I guess. He appeared to be slowing down when he got to the corner.

Q. Now, how do you know that that flashing signal was on? A. I saw it. It was on the right fender. It was a yellow blinker. It was going on and off. I saw it while it was coming.

120 Q. You say you saw — Well, you say you first saw the truck at the position you have drawn? A. Yes.

Q. Did you continue to observe it from the time you first saw it until it reached the corner? A. Yes, I did until it reached the corner and then I took my eyes off it.

Q. Now, during that time while it traveled that distance, did the truck have its blinker on all the time or part of the time? A. The entire distance.

Q. Now, why did you take your eyes off the truck? A. I thought he was going to make the turn —

THE COURT: No. This is not evidence, what the witness thought.

BY MR. ZITOMER:

Q. Now, you took your eyes off of the truck, did you? A. Yes.

Q. Where did you look then? A. I looked ahead towards the gas station for a split second and then I turned around again.

Q. How long did you turn away to look at the gas station? A. A split second, a half a second, and then I glanced back.

121 Q. When you glanced back, did you actually see the truck and the blinker? A. Yes.

Q. How do you know whether the blinker was on at that time?

THE COURT: I believe this is repetitious. The witness has three times testified that he saw the blinker.

BY MR. ZITOMER:

Q. May I ask you how long you observed the blinker after you looked

at the truck after it was almost on you? A. It was right on top of us.

Q. How long did you observe the blinker in all from the time the truck was almost on top of you until the time you got out of the car? A. About two seconds, three seconds.

Q. How long were you in the car? A. After we got hit?

Q. Yes. A. I would say about 15 or 20 seconds after the car came to a stop.

Q. What did you do during that time? A. Well, as I saw the truck just before it hit us, I yelled, "Look out" —

THE COURT: This is repetitious.

122 MR. ZITOMER: I asked how long he was in the car and he said 20 minutes —

THE COURT: The witness said 15 or 20 seconds.

MR. ZITOMER: Fifteen or 20 seconds. I want to ask him to recite what occurred during that time.

THE COURT: Go ahead.

THE WITNESS: After the car came to a stop, I was lying on top of David Williams, on his shoulders. I crawled over him and I got out of the car. David was saying, "Get me a priest" —

THE COURT: No. The question is what you did, not what anybody said. Just say what you did.

THE WITNESS: I crawled over David Williams and I got out of the car.

BY MR. ZITOMER:

Q. During the time that your car was being pushed down the road, did you have an opportunity to observe the truck? A. No, sir.

Q. What were you doing as the car was being pushed down the road? A. My back — I was trying to get away from the door.

Q. Do you know whether or not the blinker was on after the collision?

123 A. No, I don't.

Q. Do you know when the blinker was turned off? A. No, sir.

Q. Do you know whether the blinker was on at the time of the collision? A. I assume it was. I saw –

MR. STEWART: I object, if Your Honor please.

THE COURT: The answer will be stricken.

BY MR. ZITOMER:

Q. Now, can you tell the Court how many times you saw the flash, if you did, the second time you looked at the truck when it was about 15 feet away? A. Once, twice; that is all.

MR. ZITOMER: Excuse me, Your Honor.

(Short pause in proceedings.)

BY MR. ZITOMER:

Q. Now, did you, as you were watching the road ahead of you as your car was stopped in the first position near the middle line of the road, were you able to see New York Avenue any distance? A. Yes.

Q. How far up New York Avenue could you see? A. About two blocks.

124 Q. Could you see traffic coming? A. Yes, there was traffic coming down the other side.

Q. Can you describe the way traffic was approaching? A. It was coming down three lanes.

Q. Did you see any parked vehicles along the road? A. No.

Q. Did you see any cars swerving or turning one way or the other? A. No, I did not.

Q. Did you have a chance to observe throughout all that traffic and if it had been turning — A. We were parked there for a minute or so.

Q. Now, you know a minute is a fairly long time.

THE COURT: Don't comment on the evidence; just question the witness.

BY MR. ZITOMER:

Q. Now, at that time, was there any obstruction to your vision? A. No, sir.

Q. You could see cars 200 feet away from you? A. Yes, sir.

Q. And what was the weather at that time? A. It was raining.

Q. And how was the vision on the inside of your windshield?

125 A. It was clear.

Q. Now, how long was the break in traffic when the vehicle that you were in started to turn? How long had the break been? In other words, did it start immediately after the break in traffic? A. After the last automobile?

Q. Yes. A. A second or so.

Q. Now, as the car made the turn, can you characterize the turn, whether it was a sharp or a gradual turn? A. It was a normal turn as you are making a left-hand turn.

Q. And the manner in which the automobile accelerated, can you characterize that? A. As any normal person would make his turn, that is how he accelerated.

Q. What was your emotional condition at the time that you saw the truck in position 2, that is near the corner of 16th Street, and as your automobile was in position 2? Were you frightened? A. No, sir, I was calm.

Q. In your judgment, at the speed at which your car was moving in the second position and the speed at which the truck was moving when you last saw it in again the second position, could the car have made it

126 into that driveway, assuming both vehicles maintained the same speed?

MR. STEWART: Objection, Your Honor.

THE COURT: The objection is sustained. This calls for an opinion which is not proper.

BY MR. ZITOMER:

Q. Now, you mentioned that at the scene of the accident, you had gotten out of the car. Did you observe David Williams' condition at the scene of the accident? A. Yes, he was lying —

THE COURT: Just a moment. You have answered the question.

BY MR. ZITOMER:

Q. Will you tell us what that condition was? A. Yes, he was lying on the front seat and he appeared to be in severe pain. He couldn't breathe. He asked to have a priest and about — a little while after I had gotten out of the car, somebody had brought a priest and the ambulance came and the

attendant put a sheet over him, and then we got David in the ambulance, and we were taken to D. C. General in the ambulance.

Q. Then where did you go? A. They kept David Williams there overnight and they took us to Bethesda Naval Hospital.

127 MR. ZITOMER: You may examine.

CROSS-EXAMINATION

BY MR. STEWART:

Q. Mr. Purcell, have you been represented by an attorney in connection with your injuries suffered in this accident?

MR. ZITOMER: Your Honor, I have no objection if I may be allowed to develop it on rebuttal. I lay my objection now, Your Honor. I think it is improper. The reason it is improper is because this would require rebuttal that counsel would object to.

THE COURT: I cannot anticipate the questions. This appears to be addressed to credibility. The Court is required to grant the widest possible latitude on cross-examination to test credibility.

Is there a pending question, Madam Reporter?

(The pending question was read by the reporter.)

THE WITNESS: Yes.

BY MR. STEWART:

Q. Is that Mr. Zitomer? A. Yes.

Q. Now, Mr. Purcell, did I understand you to say that you visited the scene of this accident last night? A. Yes.

128 Q. And who was with you at the time, sir? A. Mr. Zitomer and David Williams.

Q. Did you make measurements with a tape of some sort or are the figures that you have given us simply paced off? A. Paced off.

Q. Did you make a measurement or pace off the width of New York Avenue in the vicinity of 16th Street? A. No, sir.

Q. Do you have an opinion as to its width? A. The entire width of New York Avenue?

Q. Yes, sir. A. I would say it is about 50 or 60 feet across.

Q. All right. And then, you would say that 16th Street, as I recall you said you paced off 38 feet as the width of 16th? A. Approximately 38 feet.

Q. So then you are saying that the width of 16th Street is anywheres from two-thirds to three-quarters of the width of New York Avenue; is that correct? A. It is less than two-thirds.

Q. Now, how many lanes of traffic can move on New York Avenue, sir?

THE COURT: How many do move?

MR. STEWART: How many do move, yes. Thank you, Your Honor.

129 THE WITNESS: Five.

BY MR. STEWART:

Q. How many lanes of traffic do move on 16th Street? A. One in each direction.

Q. Now, the first figure which you have placed on that board would be the furthest to the left. Do you see the figure that I am indicating?

A. The first figure that I wrote?

Q. Yes, this figure (indicating). A. You are talking about the truck?

Q. Yes. A. Yes.

Q. That represents the position of the truck, as I understand it, at the time you first saw it? A. Yes, sir.

Q. And you have estimated for us that that was at a point 100 feet?

A. Approximately a hundred feet.

Q. From what would be this curb line of 16th Street (indicating)?

A. Yes, sir.

Q. So then, you have further indicated that that truck traveled a distance of 100 feet to this corner, 38 feet across the street and how much further to the point of impact? A. Fifteen.

130 Q. Is the 15 feet from this curb line to the point of impact? A. To the driveway.

Q. To the driveway. A. Yes.

Q. That is 138, plus 15, that is 153 feet; is that correct? A. Yes.

attendant put a sheet over him, and then we got David in the ambulance, and we were taken to D. C. General in the ambulance.

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130 Q. Is the 15 feet from this curb line to the point of impact? A. To the driveway.

Q. To the driveway. A. Yes.

Q. That is 138, plus 15, that is 153 feet; is that correct? A. Yes.

Q. While this private car was traveling what distance? A. I would say about 45 feet.

Q. When would it be traveling 45 feet? Weren't you stopped at the center line of New York Avenue? A. Yes. We wanted to make a left-hand turn. You have to make an arc, you can't come straight across the street.

Q. All right. Now, did you notice when you visited the scene that above this corner of 16th Street, that is towards Washington, there was a building in which there was a cafeteria located? A. I saw it last night.

Q. And a service station adjoining that? A. I didn't notice that service station.

131 Q. Now, can you tell me with regard to that cafeteria, where was this tractor trailer when you first saw it? A. It was past the cafeteria.

Q. Already past the cafeteria? A. Yes, sir.

Q. Did there come a time when you and Mr. Williams and Mr. Rivera were back together again at Camp Lejeune? A. Yes.

Q. Were you present when Mr. Williams asked Mr. Rivera about this accident and Mr. Rivera asked Mr. Williams, "Where did the truck come from?" A. No, I wasn't.

MR. STEWART: That is all I have at this time of this witness, Your Honor.

THE COURT: Do you have any questions of this witness?

MR. SCHROEDER: Just a few, Your Honor.

CROSS-EXAMINATION

BY MR. SCHROEDER:

Q. Mr. Purcell, you said something about being on liberty two weeks with Mr. Rivera. When was this? A. Two weeks prior to the accident.

Q. Two weeks immediately prior to the accident? A. Yes, sir.

132 Q. And where did you have this liberty, in Camp Lejeune or in New Jersey, or where? A. Right outside of Camp Lejeune.

Q. You were not on duty for two weeks? A. We got liberty from four o'clock on until seven o'clock the next Monday morning when we had to be back to camp.

Q. Were you on liberty or leave for a weekend? A. We were on liberty, on weekend liberty for 48 hours.

Q. Now, had you gone back and forth to the New Jersey area with Rivera prior to this? A. Yes, sir.

Q. What time previous to the date of this accident had you gone back with him? A. I think it was about three weeks before we came up together on a weekend.

Q. How did you go back? A. By somebody else's car. We drove up and back with them.

Q. Well, now, on this occasion, where did you meet Rivera to get in the car to start back from New Jersey to Camp Lejeune? A. He picked me up at my house.

Q. The same place you are living now? A. No, sir.

133 Q. At what address? A. 98 Percy Street, Jersey City, New Jersey.

Q. Was anybody else in the car at the time? A. No, sir.

Q. Did your brother or somebody accompany you? A. No, sir.

Q. All right. Who else joined in this trip? A. After Mr. Rivera picked me up, we went to pick up Mr. Williams at a luncheonette.

Q. Anybody else? A. Yes. We picked up two brothers at the turnpike.

Q. What were their names? A. I think it was Napoleon.

Q. And what was the first stop you made after all five of you were in the car, for coffee or for gas? A. Yes, we stopped.

Q. Where was that? A. I think it was on the turnpike.

Q. On the New Jersey Turnpike? A. Yes.

Q. What did you stop for, coffee or gas? A. Both.

Q. Who paid for the gas? A. Who paid for the gas?

134 Q. Yes. A. Rivera did.

Q. Did anybody else contribute? A. Everybody chipped in.

Q. Do you know how much? A. I don't remember.

Q. Did Williams contribute? A. Yes, sir.

Q. Did you make another stop after that before you got to the Washington, D. C. area? A. Yes, sir.

Q. Where was that? A. Some place in Maryland.

Q. You just don't know exactly? A. No, sir.

Q. Then you got gas again? A. Yes.

Q. Did all five of you contribute towards the gas? A. Yes, sir.

Q. Who was driving the car after you made the stop in New Jersey until you made the stop in Maryland? A. David Williams was driving.

Q. Did you ever drive the car? A. No, sir.

135 Q. Did Rivera resume driving the car in Maryland? A. Yes, sir.

Q. Was there any conversation as you approached this area about stopping for gas? A. No, sir.

Q. None at all? A. No, sir.

Q. Well, was anybody looking for a gas station? Specifically, were you looking for a gas station? A. No, sir, Rivera was driving. I didn't look.

MR. SCHROEDER: No further questions.

THE COURT: Is there redirect examination?

MR. ZITOMER: Would Your Honor bear with me if I ask one question which should have been asked on direct examination?

THE COURT: Certainly.

REDIRECT EXAMINATION

BY MR. ZITOMER:

Q. Did you hear or see orange or yellow signals or noise of warning of any kind between the time you first saw the truck until the time of the collision? A. I heard no horn; the only thing I saw was the light, that is the only thing.

136 Q. You mentioned the total distance, to Mr. Stewart, to the edge of the driveway —

MR. SCHROEDER: Your Honor, I would object to this now. He is going to redirect and he only asked permission to ask one question.

MR. ZITOMER: No, Your Honor, this is redirect.

THE COURT: This is redirect examination. Counsel asked to present a question which had been overlooked through inadvertence.

MR. SCHROEDER: Excuse me, Your Honor.

THE COURT: Go ahead with your question.

BY MR. ZITOMER:

Q. Would you take the marker and show the distance that you were referring counsel to when you said the edge of the driveway? A. (At the board.) (Indicating.)

Q. What is the distance from the edge of the driveway to the other side or far side of 16th Street? A. It is 15 feet to here (indicating) and 38 feet across 16th Street.

Q. Where was the automobile with respect to that edge of the driveway? A. Our automobile?

Q. Yes. A. When we got hit?

137 Q. Yes. A. It was half way across the driveway.

Q. Now, do you know how wide that driveway is? A. Thirty-two feet, I believe.

Q. Was your car coming towards one side or the other of the driveway, or was it in the center? A. In the center of the driveway.

MR. ZITOMER: That is all. Thank you.

THE COURT: Anything more?

MR. STEWART: I have nothing further, Your Honor.

MR. SCHROEDER: No, Your Honor.

THE COURT: The witness may step down.

(The witness left the stand.)

MR. ZITOMER: Your Honor, I offer an admission of the defendant Goldberger, so much of his affidavit attached to his motion for summary judgment, the affidavit filed February 27, 1961, on behalf of the defendant Goldberger.

THE COURT: You offer the entire affidavit, is that correct, as an admission?

MR. ZITOMER: Your Honor, only so much of it as relates to allowing the use of his license plates.

MR. SCHROEDER: I object, Your Honor. May we approach the Bench on this?

138 THE COURT: You may.

(At the Bench:)

THE COURT: I would suggest that you designate the portions which you have specifically in mind.

MR. ZITOMER: The point begins with the second line of the fourth paragraph beginning, "It was our agreement."

THE COURT: The second line of the fourth paragraph beginning, "It was our agreement"?

MR. ZITOMER: Yes, sir.

THE COURT: And you offer to the end of the affidavit, is that correct?

MR. ZITOMER: There is a statement about Rawlings having paid for the damages. I didn't want to offer that in the fourth line of the succeeding paragraph, the line reading, "by a vehicle owned by Rawlings Truck Lines", I would stop at that point and then resuming —

THE COURT: Just a moment.

(Short pause in proceedings.)

THE COURT: Is there objection to this tender?

MR. SCHROEDER: Yes, Your Honor.

THE COURT: State your objection.

MR. SCHROEDER: First, there is no request for admissions in this file. This is not an admission. This was filed solely for the purpose

139 of arguing the motion for summary judgment and was not in answer to request for admissions, and should not be admitted for that reason. If he had filed a notice for admissions prior to trial, I would have had the opportunity to refute. I think if the affidavit is admissible, the whole thing should be admitted.

The thing he wishes to have admitted mentions automobile insurance which should not get before this jury.

THE COURT: Are you finished?

MR. SCHROEDER: Yes, Your Honor.

THE COURT: Do you have any objection with reference to this offer, Mr. Stewart?

MR. STEWART: Perhaps I misunderstood. I want to be certain. There are several references in here of Rawlings Truck Line and their payment to Rivera which was denied and, of course, this would be prejudicial as to Rawlings in that respect and I would object to any reference to Rawlings having paid anything to Rivera.

THE COURT: Are you finished?

MR. STEWART: Yes, Your Honor.

THE COURT: Do you desire to be heard with reference to the objections?

MR. ZITOMER: I had deliberately omitted that reference in my portion of the tender.

140 MR. STEWART: That is what I say, I may have misunderstood you.

MR. ZITOMER: And part of my offer — I did not know whether the Court wanted to take it up a part at a time. I want to take out the last line of the paragraph following that which begins, "a few days after June 1, 1958" and ending with "in an accident with a truck."

That brings us to the second page, "I turned my plates in to the license bureau a few days later" period.

MR. STEWART: May I inquire, does he propose to eliminate that paragraph?

MR. ZITOMER: Just the last line. I want to read, "A few days after June 1, 1958 Mr. Rivera brought the license plates in to my wife's place of business and told her that his car had been in an accident with a truck" and stop at that point. Then, "I turned my plates in to the license bureau a few days later" period.

MR. STEWART: I withdraw my objection, Your Honor.

THE COURT: I believe that any statement made by a party is admissible as an admission whether or not it is formalized by being made in response to a request for admissions.

I do believe that in fairness to the defendant Goldberger, the first three paragraphs are an essential part of the admission in order that the

141 jury will understand the transaction. The mere tender of the

statement with, "It was our agreement" does not adequately describe the transaction.

I will admit in evidence the affidavit as it appears in the Court's jacket and ending in the sixth line of the fourth paragraph, that is, "and mail my plates to me" eliminating the clause relating to automobile insurance.

I will permit the following sentence, "After a week's time, I did not get my license plates, I asked his mother" and so on down to the line, "by a vehicle owned by Rawlings Truck Lines" and placing a period at that point.

I don't understand why you tender the paragraph, "A few days after June " — What point are you trying to establish by what happened a few days after June 1, 1958?

MR. ZITOMER: I am trying to show that the license plates were the license plates of Goldberger at the time of the accident.

THE COURT: I think that is admitted from the prior statement. However, if you see some value of this, I will permit you to include in your tender the following statement: "A few days after June 1, 1958, Mr. Rivera brought the license plates in to my wife's place of business and told her that his car had been in an accident with a truck" and, "I turned my plates in to the license bureau a few days later."

142 The Court will admit the tender of those sections.

MR. SCHROEDER: Your Honor, right in the middle of the fourth paragraph, the phrase, "After a week's time", seems important to me.

THE COURT: That is part of the admission.

The Court will admit in evidence as an admission the following:

"Harry Goldberger, being duly sworn on oath, says as follows:

"I live at 190 West 170th Street, Bronx, New York, and am 70 years of age.

"On May 3, 1958 I sold my 1950 Mercury, Engine No. 50ME-59243, License Plate No. BB2261 to Joseph A. Rivera of 532 Tinton Avenue, Bronx, New York.

"At the time of the sale, Joseph Rivera was in the U.S. Marine Corps and he paid me a $25.00 deposit on the day of the sale and on the following week, his mother paid me the balance of the purchase price which was $125.00.

"On the day of the sale, I signed the back of the registration card and transferred the car to Joseph Rivera. It was our agreement that he would drive the car to the Marine base where he was stationed, using my license plates. When he arrived at the base,
143 he was to get his own license plates, and mail my plates to me. After a week's time, I did not get my license plates, I asked his mother why he did not return my license plates, and she told me that he was sick and could not get his own license plates.

"It is my understanding that Mr. Rivera was involved in an automobile accident on June 1, 1958 with his automobile in the District of Columbia and that he was struck by a vehicle owned by Rawlings Truck Lines.

"A few days after June 1, 1958 Mr. Rivera brought the license plates in to my wife's place of business and told her that his car had been in an accident with a truck.

"I turned my plates in to the license bureau a few days later."

MR. SCHROEDER: Thank you, Your Honor.

MR. ZITOMER: Your Honor, while we are here, may I have the record show that I had originally offered only a portion of the affidavit and that the Court denied that portion or would allow the total in evidence and, therefore, I have offered the total?

THE COURT: The record indicates word for word everything that has transpired at the Bench.

144 MR. ZITOMER: I would like the record to show that I would have preferred to offer those portions originally offered and because of the Court's indication that it would overrule such a proffer, then the total was offered.

THE COURT: Very well.

(In open Court:)

THE COURT: Go ahead. You may read the affidavit as it has been granted by the Court. You may first explain what it is.

MR. ZITOMER: Thank you, Your Honor.

Ladies and gentlemen of the jury, this is an affidavit of Harry Goldberger, one of the defendants in this case, taken from the Court file in this case.

The affidavit reads as follows:

"Harry Goldberger, being duly sworn on oath, says as follows:

"I live at 190 West 170th Street, Bronx, New York, and am 70 years of age.

"On May 3, 1958 I sold my 1950 Mercury, Engine No. 50ME-59243, License Plate No. BB2261 to Joseph A. Rivera of 532 Tinton Avenue, Bronx, New York.

"At the time of the sale, Joseph Rivera was in the U.S. Marine Corps and he paid me a $25.00 deposit on the day of the sale and on the following week, his mother paid me the balance of the
145 purchase price which was $125.00.

"On the day of the sale, I signed the back of the registration card and transferred the car to Joseph Rivera. It was our agreement that he would drive the car to the Marine base where he was stationed, using my license plates. When he arrived at the base, he was to get his own license plates, and mail my plates to me. After a week's time, I did not get my license plates, I asked his mother why he did not return my license plates, and she told me that he was sick and could not get his own license plates.

"It is my understanding that Mr. Rivera was involved in an automobile accident on June 1, 1958 with his automobile in the District of Columbia and that he was struck by a vehicle owned by Rawlings Truck Lines.

"A few days after June 1, 1958 Mr. Rivera brought the license plates in to my wife's place of business and told her that his car had been in an accident with a truck.

"I turned my plates in to the license bureau a few days later."

Your Honor, in view of the evidence, again I would like to reoffer the traffic regulations which we discussed at the Bench earlier.

146 THE COURT: You mean the entire list?

MR. ZITOMER: The ones relating to speed.

THE COURT: You must be specific. You may come to the Bench, if you desire.

(At the Bench:)

THE COURT: What traffic regulation or regulations are you offering at this time?

MR. ZITOMER: Regulation 99c which reads, "An operator shall" —

THE COURT: Just tell me the numbers.

MR. ZITOMER: 22c.

THE COURT: Anything else?

MR. ZITOMER: 143a; Section 22a; Section 146c.

THE COURT: Anything else?

MR. ZITOMER: And Section 147b as to the defendant Rawlings.

THE COURT: Are you finished?

MR. ZITOMER: Yes, sir.

THE COURT: The Court consumes a lot of unnecessary time to have to consider these regulations twice. That should not have been tendered until you completed your testimony. It is obviously a waste of time to go over all of these again.

147 MR. ZITOMER: I didn't anticipate it would make any difference. I didn't anticipate there would be any changes.

THE COURT: Is there objection to 22a?

MR. STEWART: There has been no evidence to support that to cause Your Honor to change your prior ruling. Your Honor, the evidence in that regard has not changed since Your Honor previously heard argument on the admission of this regulation.

THE COURT: What evidence do you say there is as to speed that justifies this regulation?

MR. ZITOMER: The evidence, Your Honor, is that he did not slow down or stop his vehicle or attempt to bring his vehicle under control until he was 15 feet away and the evidence would show, therefore, that for a distance of 85 feet, he was traveling at a speed which was improvident under the circumstances based primarily on the lack of evidence to slow down. If there is someone in front of you, any speed would be a violation of that section.

THE COURT: I believe the section to which you refer is within the provisions of Section 22c which has been admitted into evidence as to both drivers. I will sustain the objection to 22a. Section 22c has already been admitted in evidence as to both drivers.

148 Your next tender is as to 47b. The Court has already admitted it in evidence as to the defendant Goldberger only.

Your next tender is of Section 99c.

MR. ZITOMER: I don't mean to interrupt Your Honor, but I was offering 47b with respect to Rawlings. Your Honor had admitted it with respect to Goldberger. I was offering it with respect to the other defendant.

THE COURT: I will again sustain the previously voiced objection to this section insofar as it relates to the defendant Rawlings.

Is there any objection to Section 99c?

MR. STEWART: Your Honor, this is such a general and broad regulation and there certainly has been no further testimony which would create a basis, in the light of additional testimony, for the admission of such a regulation. The expression of the regulation has not been shown to have been violated by any of the evidence.

THE COURT: Anything further?

MR. STEWART: No, Your Honor.

THE COURT: Do you have anything to add?

MR. SCHROEDER: No, except that the same thing applies to my client: No additional evidence has been introduced in this respect that would warrant Your Honor's changing his prior ruling.

149 THE COURT: Do you have anything additional to say?

MR. ZITOMER: The defendant himself, when asked for an explanation, gave one which the jury may reject and I think this regulation should be admitted.

THE COURT: The Court will sustain the objection to 99c. The Court sees no evidence in the record of failure to give full time and attention.

Is there any objection to 143a?

MR. STEWART: Your Honor, the regulation as to equipment has been complied with and there is still no showing that in the language of the regulation a determination as to the use of the horn is placed upon the operator of a vehicle. There is no showing or evidence here that he should have concluded to use the horn. There has been no further evidence since the regulation was discussed and ruled upon previously by Your Honor.

THE COURT: I assume the testimony of the witness Purcell when he was asked whether there was any horn or signal, I assume that is what counsel has in mind. Purcell said he didn't hear a horn.

MR. ZITOMER: Yes, Your Honor, that is what I had in mind.

MR. SCHROEDER: I assume that only refers to the defendant Rawlings, not as to Rivera's automobile.

150 THE COURT: I think it was obvious that was the thrust of that question. I will admit 143a, that is the last sentence of the section, as to the defendant Rawlings.

Is there any objection to Section 146c? I assume there is. In the interest of expedition — if there is such a thing in the trial of a case — I will again sustain the objections to Section 146c on the ground that there is no evidence that the windshield wiper was not in proper working condition.

Do you have further testimony?

* * * * *

151 THE COURT:

* * * * *

152 I will then assume for the record that you rest your case. You have offered all of your testimony as to liability on the part of both defendants and your one remaining witness, the wife of this plaintiff, will testify only as to injury and damages. You may reserve the right to call her when she is available.

MR. ZITOMER: That is the case, Your Honor.

* * * * *

167 ARGUMENT IN SUPPORT OF MOTION FOR A DIRECTED VERDICT

MR. SCHROEDER: On behalf of the defendant Goldberger, I would make a motion that the case be dismissed as to him.

First of all, because there is no showing of ownership on the part of Mr. Goldberger. All of the plaintiff's evidence is that the car belonged to Rivera. The first witness, Williams himself, said he was riding in Rivera's car. The next witness, the police officer, said that at the scene, Rivera stated it was his car; that he had paid for the car; that he had the registration signed over to him; that he had a bill of sale, all of which he exhibited to the policeman and that he was using the plates of Mr. Goldberger.

Now, Purcell also said that Rivera had bought the car.

168 Finally, the affidavit of Mr. Goldberger which the plaintiff introduced says that the sale was completed on May 3rd, that he had received all of his money; that he had signed the registration card and transferred the car to Rivera, and the only thing that he did wrong and it is not something that is civilly wrong but perhaps a traffic violation or violation of a police regulation, is that he allowed someone to use his plates.

So I say that there is no evidence — in fact, the evidence is uncontradicted that Rivera was the owner of the automobile.

Now, on that point, Your Honor, we do have a District of Columbia case from the former Municipal Court of Appeals which is squarely in

point and has all of the same facts that we have in this case as to the sale. It wasn't even as good as this case because in that case the sale had been completed but the money had not been paid in that sale, just the down payment had been received, but regardless the Court said that all indicia of ownership had gone over to the buyer and that the seller, although the buyer had allowed him to use his plates, that in the District of Columbia although this might be a violation of police regulations, it was not indicia of ownership.

New York does not have a formal title transfer like we have in the District of Columbia. The New York car is sold and transferred when the
169 registration is signed over to the buyer.

Now, I really have three arguments about this point, Your Honor —

THE COURT: Apparently, you don't have much confidence in any one if you need three.

MR. SCHROEDER: Well, it is presumptious to ask you to rule on that one. I would like to sit down and get a ruling on that one, but, Your Honor, I was wondering if you would indulge me, if I may.

THE COURT: Very well. Go ahead.

MR. SCHROEDER: The other point is if you should find that Mr. Goldberger should not have allowed the buyer to use the plates, the transaction was made on May 3rd and the plates were to be used for one week. This accident occurred a month, not quite a month, maybe a day or two short of a month, after the original agreement. So that one week after May 3rd, the buyer no longer had permission to use the plates and, therefore, if that is indicia of ownership, he no longer had permission to use the car.

Finally, if you overrule me on that, I would go into the next point and on that score, the case cited by Mr. Stewart, Rogers v. Cox, is distinguished because that was an intersection case at 15th and Constitution Avenue involving a traffic signal, the red and green light, and the facts
170 in that case were that the car making the left turn had been sitting facing a red light and he was going in a westerly direction, just as Rivera

was doing here, intending to turn left and go south on 15th Street toward the Washington Monument. Coming in the opposite direction were at least two lanes of traffic, also going east, sitting there waiting to go ahead. The next lane was vacant. The man traveling west — I forget which one it was — when he got the green light, he turned left in front of two lanes of traffic and they just sat there and waited. They gave him the right of way even though they might have claimed it. When he got to the third lane, another vehicle came down in that third lane and, having the green light, they had a collision.

The trial court there, for some reason which is not in the opinion, found the man with the right of way was not negligent and the trial court ruled as a matter of law in that situation that the left turner was guilty of negligence.

But I don't think that applies in this case. Our case is distinguished. We are not at an intersection and, according to the plaintiff's theory of the case as I have heard it as far as Rivera is concerned, when Rivera was stopped to make a left turn, the Rawlings truck was some 150 feet

171 away, not traveling at any great speed. There is no testimony that the truck was traveling too fast or that there was any reason why Rivera could not get across three lanes of traffic ten and a half feet wide and into this gas station. I haven't heard one word of evidence — even if I had to defend Rivera — that I would think would hold Rivera in the case on negligence.

## ARGUMENT IN OPPOSITION TO MOTION FOR A DIRECTED VERDICT

MR. ZITOMER: Your Honor, in the brief which we filed, we cited some decisions and I would like the Court to consider that brief which is a matter of record in this case in lieu of my argument. I could argue further but I don't want to unnecessarily take the Court's time.

With respect to the affidavit of Goldberger, I would like to point out to the Court that there is some evidence in this case to indicate that Rivera bought this automobile Sunday morning, June 1st, 1958. He had

no automobile prior to that time. And further on in the affidavit, we have the statement that he was going to use it to go down to Camp Lejeune and on this day, he was in fact going down to Camp Lejeune; and, further, the fact that his mother said that he was ill from — undoubtedly, from his accident — and it was shortly after June 1st. As far as the affidavit is concerned, there is some discrepancy there which may not represent the
172 facts. I won't consider that as of any major importance but the important thing, I think, is the question as to the application of the law of the District of Columbia as it applies under all the circumstances of this case.

As I suggested previously, although we apply the District of Columbia law, the law relating to the circumstances of transfer and ownership would be governed by the law of New York. I think counsel very candidly admitted that under the law of New York, Mr. Goldberger was in fact the owner of the vehicle at the time of the collision and this is admitted in his own pre-trial brief.

Now, with respect to the question of negligence, there seems to be some circumstances of negligence here for the jury as to whether or not he used improper judgment in relying on the signal given by the truck driver. The jury could conclude that he placed too much reliance upon the signal of the truck driver before he crossed the street.

I think that is an issue for the jury.

## REBUTTAL ARGUMENT IN SUPPORT OF MOTION FOR A DIRECTED VERDICT

MR. SCHROEDER: Your Honor, my pre-trial brief does not say what the plaintiff represents it to say. I do not agree that the law of New York should be applied in this case one iota whatsoever. All I said about New York law was that in the State of New York, it was their policy to ap-
173 ply their own law when they were dealing with a similar situation involving tags, title and registration of a Connecticut car, and through that analogy and through the case which we have in the District of Columbia which I forgot to give Your Honor the citation on, but it is Burt v.

Cordover, 117 Atlantic 2d 116. That case involved a car that was sold, the down payment received but not full payment received, all indicia of ownership and title. It was a District of Columbia car. It was turned over to the buyer and the buyer represented that he was going to take the car to Maryland to register it.

Similarly, in this case, it was taken to North Carolina to register it and the previous owner allowed the buyer to use the plates to get it to where he was going to register it. And that is what happened in this case. The car was completely transferred and Mr. Goldberger was allowing Rivera to use the plates to get to where he was going to register the car.

ORAL RULING OF THE COURT

THE COURT: The Court will grant the motion of the defendant Goldberger to dismiss.

* * * * *

174 DAVID M. WILLIAMS

called as an adverse witness by the defendant, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STEWART:

175 Q. Mr. Williams, after you were transferred from D. C. General out to Bethesda Naval Hospital, you were then in the ward with Mr. Rivera? A. No, sir.

Q. Did you see him at the hospital? A. Yes, sir.

Q. And, of course, eventually both of you returned to Camp Lejeune, is that correct? A. Yes, sir.

Q. So you had occasion to discuss this accident with Mr. Rivera, did you not? A. We had occasions.

Q. All right. And in the course of discussion with Mr. Rivera at Camp Lejeune, did you ask him —

MR. ZITOMER: I object to this, Your Honor. If we are going to have Mr. Rivera's testimony — I would like to have it but I object to his introducing it through this witness.

THE COURT: There is no question pending. As I understand that part of the question which the Court has been able to hear as to what Rivera said, as I understood the question being formulated, it was addressed to something that this witness said.

Will you complete your question.

BY MR. STEWART:

176 Q. Did you, in the course of your discussion, ask Mr. Rivera as to what he saw, what had happened and how it happened? A. I am sure I must have asked him questions similar to that. I can't remember the exact language.

Q. Now, please don't answer this before your counsel has a chance, if he chooses, to object.

THE COURT: Are you going to quote from something that Rivera is alleged to have said?

MR. STEWART: Yes, Your Honor.

THE COURT: You may come to the Bench.

MR. STEWART: Thank you, Your Honor.

(At the Bench:)

MR. STEWART: I propose to ask him if Mr. Rivera didn't then say to him that he, Rivera, wanted to know where the truck came from.

THE COURT: Are you finished?

MR. STEWART: Yes, Your Honor.

THE COURT: Is there an objection?

MR. ZITOMER: Yes, Your Honor, on the ground that it is hearsay. The same objection as was raised when I asked the plaintiff what Rivera had said at the scene of the accident.

THE COURT: What do you say to the objection?

177 MR. STEWART: At that time, Mr. Goldberger was then a defendant in this case and the objection was in part addressed to the effect that such a statement would have upon Mr. Goldberger's position and in addition the objection was made that it was hearsay, but now we have testimony of Mr. Purcell and we have testimony of Mr. Williams with respect to a blinking

of the tractor trailer light, suggesting that this left turn was made as a result of seeing a signal of a right-hand turn. I propose to show by this testimony and from Mr. Williams' deposition that he has been aware all along that Rivera didn't even know where the truck came from.

THE COURT: The objection to the question is sustained.

(In open Court:)

* * * * *

178 JOHN EDWARD WILLIS

called as a witness on behalf of the defendants, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. STEWART:

Q. Mr. Willis, what type of a load were you carrying on the trailer unit? A. A load of lumber.

Q. Where were you taking the lumber to? A. To Philadelphia, Pennsylvania.

Q. Now, what type of tractor were you operating? A. A 1957 White.

Q. Would you explain, please, just what lights there were on the tractor and trailer unit that you were operating? A. There was seven — eight lights at different spots: two headlights, four lights on the top of the cab and two more on the corner of the trailer.

Q. Can you approximate for us the position of your tractor trailer at the time you turned off your signal indicator? A. It was headed straight.

Q. And where was it with relation to 16th Street? Where were you then? A. I was approaching 16th Street.

179 Q. Would you indicate for us when your tractor trailer was in that position, that is back in this right lane, and you turned off the small indicator, describe what traffic there was in the general area? A. In the south-bound lane was two lanes on the side of the street going north; just ahead of me was a couple cars who had just passed.

Q. Was it then raining? A. Yes, sir.

Q. Would you say it was raining hard? A. It was raining very hard.

Q. Before the impact took place between the tractor and the private automobile, did you apply your brakes? A. Yes, sir.

Q. What color were the lights that were on the top of the tractor unit you were driving? A. Yellow.

Q. What color were the lights which were your turn signal indicators? A. They indicate yellow when they are on.

MR. STEWART: I believe that is all I have of this witness, Your Honor.

THE COURT: Do you have any further questions on this testimony?

180 MR. ZITOMER: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. ZITOMER:

Q. Do you recall, Mr. Willis, on that deposition that we referred to earlier that I asked you this question: "Could you give my any reason why you didn't see the automobile before you did?"

Do you recall your answer, "No"?

MR. STEWART: Your Honor, I object. This is beyond the scope of the direct examination at this point. Now, I did not go back into the whole thing because I did not want to repeat the previous testimony of the witness.

THE COURT: To what point in the testimony is this question addressed?

MR. ZITOMER: Counsel has injected that it was raining so hard. If this was an explanation as to why he couldn't see, I would like to explore it further.

THE COURT: You may state your question to the witness.

BY MR. ZITOMER:

Q. The question on page 36 of this deposition — as a matter of fact, it is the very first question on page 36. The question was: "Could you give me any reason why you didn't see the automobile before you did?"

181 Do you recall your answer to that question was, "No"? A. That is right.

Q. You recall talking to the police officer, don't you, about the fact that you had put on your turn signal in passing the truck? A. Yes, sir.

Q. Do you recall telling the police officer that you put on your right turn signal when you passed the truck? A. That is right.

Q. Then you hit the automobile? A. Not with my signal on.

Q. You didn't tell him you had cut it off, did you? A. I don't know that you asked me.

Q. You don't think the police officer asked you that? A. I didn't know you were speaking about the police officer.

Q. Well, that's who I am talking about, the police officer who testified on the witness stand yesterday.

THE COURT: What is your question to the witness?

MR. ZITOMER: That is all I have, Your Honor.

THE COURT: Anything more, Mr. Stewart?

MR. STEWART: No, Your Honor.

THE COURT: You may step down.

(The witness left the stand.)

* * * * *

183 MR. STEWART: Your Honor, if I might impose on you to use your traffic regulation book for just a minute –

THE COURT: I don't believe I have gotten mine back from the last time I lent it.

MR. ZITOMER: Excuse me a minute. I will go and get mine.

(Short pause in proceedings.)

THE COURT: What sections of the traffic regulations are you offering in evidence, Mr. Stewart?

MR. STEWART: 39a is the first one, Your Honor.

THE COURT: Anything further?

MR. STEWART: 47b.

THE COURT: 47b has been admitted in evidence. The Court restricted its admission at that time, however, to the then defendant Goldberger.

Anything else?

MR. ZITOMER: Is this Section 47b now in evidence by this defendant?

THE COURT: It has been offered by this defendant.

Anything else, Mr. Stewart?

MR. STEWART: I believe that is the last one, Your Honor.

THE COURT: Is there any objection to the admission in evidence by this defendant of Section 39a?

184 MR. ZITOMER: No, sir.

THE COURT: Section 39a will be admitted in evidence.

Is there any objection to the admission in evidence of Section 47b, which would appear is not in evidence at this time since the defendant Goldberger has been dismissed from the case? Is there any objection to Section 47b?

MR. ZITOMER: No, sir.

THE COURT: Section 47b will be admitted in evidence.

* * * * *

189 JOSEPH JOHN PURCELL

recalled as a witness on rebuttal in behalf of the plaintiff, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ZITOMER:

Q. Mr. Purcell, you are still under oath. A. Yes.

190 Q. I recalled you only to ask you at the time you first saw the truck, what portions of the truck could you see? A. I could see the whole front of the truck. There was nothing else between us and the truck.

MR. ZITOMER: Thank you. That is all.

MR. STEWART: I have no further questions, Your Honor.

THE COURT: You may step down.

(The witness left the stand.)

* * * * *

191 THE COURT: Does that complete your rebuttal testimony?

MR. ZITOMER: Yes, Your Honor. I would only resubmit the traffic regulations already offered.

THE COURT: The Court will reject any that have not been previously admitted in evidence.

* * * * *

194 THE COURT: Very well.

I will assume for the record, Mr. Stewart, that you renew your motions previously made. The Court will again reserve action on your motion for a directed verdict and on any previously made motions, the Court

195 will rule as I have in the past.

MR. ZITOMER: I assume that Your Honor will make it abundantly clear to the jury that the evidence does not require that the negligence of the truck driver be the sole cause of the accident but that negligence in any degree contributing to the accident.

THE COURT: The Court will point out that the negligence of one or more factors may be considered, in which event each of the contributing factors is a probable cause of the injury.

MR. ZITOMER: I didn't raise these earlier by formal prayer: the same with respect to the matter of damages, would the jury be explained whether the negligence, however the share may be shared between the two vehicles, that the liability is for the entire injuries and they return one verdict?

THE COURT: The Court will point that out to the jury.

MR. ZITOMER: Then, Your Honor had discussed some explanation be given as to the absence of Rivera in the case. The record in this case will show that Rivera was named as a party by the defendant Rawlings Truck Line and that there are statements in the record by the defendant

196 Rawlings stating that they had difficulty locating him and serving Rivera, and I would tell the Court that this has been likewise with us. We have been completely unable to locate hide nor hair of Rivera. I would like the Court to make some explanation to the jury with respect to Rivera's absence in the case.

THE COURT: I believe Mr. Stewart objected to any statement to the jury on this previously. I would suggest that you prepare a suggested

statement for the Court to make to the jury on the question of Rivera's absence so that we will have a complete record and the Court will afford Mr. Stewart, then, an opportunity to comment on it.

MR. ZITOMER: Thank you, Your Honor.

* * * * *

198 Monday, January 27, 1964

* * * * *

199 THE DEPUTY CLERK: Case of Williams versus Rawlings Truck Line, Incorporated.

MR. ZITOMER: Your Honor, may I hand up plaintiff's requested Prayers 2, 3, 4 and 5?

THE COURT: I thought we disposed of prayers on Friday.

MR. ZITOMER: Your Honor, I had given it some additional thought and particularly in connection with the problem that we had discussed Friday about the absence of some of the parties and, upon reviewing the cases, I came upon these and felt they were appropriate in this case. I tried to limit them only to those which were actually needed. I have already given Mr. Stewart a copy of these requested instructions a few minutes ago.

THE COURT: Very well.

Is there any objection, Mr. Stewart, to plaintiff's requested Prayer No. 2?

MR. STEWART: Yes, Your Honor.

THE COURT: State your objection.

MR. STEWART: In this requested Prayer No. 2, plaintiff suggests that the law is to the effect that one giving a signal, a mechanical signal, is bound thereupon; that other motorists have a right to rely upon that

200 motorist giving the signal doing what the signal protrays. We know as a practical matter that is not what goes on day in and day out. I knew of no regulation or case upon which this supposedly is the basis of the law.

THE COURT: Are you finished?

MR. STEWART: Yes, Your Honor.

THE COURT: What do you say to the objection?

MR. ZITOMER: Your Honor, the prayer is prepared under the general duty of a driver to exercise due care under all of the circumstances. We felt that the plaintiff had a right to have its theory submitted to the jury.

Now, I would like to say that Mr. Stewart, I think, misconstrues a couple of things here. We are not suggesting in this prayer that the driver has the duty to make a turn, to execute the signal, which he indicates but simply a duty to know and recognize all of the circumstances surrounding his actions and the traffic conditions and signals which have been given, and recognize the qualities of human nature that exist and recognize that others, rightly or wrongly, might be affected in the way in which he operated his vehicle and, therefore, he is under the duty to be on the alert of not only with respect to the driving but take into consideration under the circumstances that he has made such a signal.

201 I think that is the main thrust of this instruction, that the driver should take into account the circumstances that exist at the time and one of them is the signal.

THE COURT: The Court will deny the prayer in the form in which it is submitted.

Is there any objection to the plaintiff's requested Prayer No. 3?

MR. STEWART: Yes, if Your Honor pleases. This is an effort to translate certain language which the Court of Appeals has used in intersection accidents into a general proposition applying to this case.

It is true that a motorist is obligated to exercise due care for the safety of all, which would include a lookout. I don't think the law goes to the point of instructing the jury further that a given motorist did not look on a certain circumstance.

THE COURT: Are you finished?

MR. STEWART: Yes, Your Honor.

THE COURT: What do you say to the objection?

MR. ZITOMER: Your Honor, I think it is well recognized in all of the cases on the subject that if a witness testifies that he looked and didn't

see and they are satisfied from the evidence before them that he should have seen —

202 THE COURT: Is that the prayer you are requesting, failing to see what is there to be seen?

MR. ZITOMER: Essentially, that is the main thrust of it.

THE COURT: The Court will grant that prayer in substance but I think that this phraseology is somewhat confusing in this prayer. I will deny this prayer in the form in which it is submitted but will charge the jury on the responsibility of looking and seeing what is there to be seen.

Is there any objection to the requested Prayer No. 4?

MR. STEWART: Yes, Your Honor, for the reason that the record in this case shows the only efforts made to bring Mr. Rivera into this litigation or to serve him was by the defendants Rawlings Truck Line and John E. Willis.

THE COURT: Counsel for the plaintiff has represented at the Bench that he assisted in trying to find this man.

MR. STEWART: That is a rather amazing statement, if Your Honor pleases, in view of the fact I know from the file available to me that Mr. Zitomer was counsel for Mr. Rivera. Now, for that reason, I say it is a rather amazing suggestion that counsel would want to add his own client

203 as a party defendant in a suit brought on behalf of another client. I feel that the record does not reflect any efforts by anyone other than Rawlings Truck Line and John E. Willis, and I respectfully submit this prayer should not be submitted.

THE COURT: What do you request the Court to do as a counter-statement to the jury?

I ask this question because I think it is unfair to the jury to make a mystery of the fact that this man was not present.

MR. STEWART: Your Honor, I have truthfully debated that myself over the weekend, trying to conclude in a selfish vein — I think that is the proper word to use — what advantage would inure to me or my defendants by some statement as opposed to none, and I don't feel there is

any statement which Your Honor can make to them on the basis of the evidence before the Court which would be more helpful to these defendants than for the jury to be told nothing.

THE COURT: Very well.

What do you say in support of this prayer?

MR. ZITOMER: As Your Honor has indicated, silence to the jury in this case leaves a great big opening for them to go astray and be derailed. Now, the jury I think should be kept on the issue in the case and by pointing out that they are not to consider these matters which are

204 necessarily before them by the absence of the party, that by not instructing them, we are inviting them to speculate and which speculation can only serve to injure the plaintiff's cause.

Now, I don't know what counsel expected or wanted of us. We have supplied counsel with Mr. Rivera's address, 588 Hinton Avenue. There has been an attorney in New York City who apparently has represented Mr. Rivera, who has been to us and we advised him that we cannot and had not represented him in connection with this case because of the conflict. We have attempted to locate him and the witness Purcell has indicated that he doesn't know where he is. The record is quite clear that the defendant Rawlings has gone to extraordinary measures in attempting to get a special process served and attempting to locate Mr. Rivera through his relatives. He has delayed the calendaring of this case for at least a year in his attempts to locate Mr. Rivera.

Now, surely, if the defendants with their resources cannot locate him and all we have is his address and we have supplied that to counsel, I don't see how we can be expected to do any more.

THE COURT: The Court will instruct the jury that as they have observed Joseph Rivera, the operator of the Mercury automobile, was

205 not before the Court in this case. The jury should, therefore, draw no inferences for or against either party by the fact that he did not appear in this case as a party or as a witness, nor should they speculate about the matter.

Is there any objection to plaintiff's requested Prayer No. 5, Mr. Stewart?

MR. STEWART: If Your Honor pleases, I understood you to say on Friday that you contemplated including in your charge an instruction on this general subject matter of the right of the plaintiffs to recover against one defendant where two were involved.

Now, I feel that though I recognize that to be the law, certainly, I feel that the latter portion of this prayer as drawn dwells upon in an argumentative sense the right of the plaintiff in this situation as Mr. Williams has in this particular suit.

For that reason I object to this prayer as it is drawn. I recognize it is a general proposition of the law.

THE COURT: The Court will grant the prayer in substance.

MR. STEWART: If the Court pleases, if Your Honor does not feel it inappropriate for me to inquire: You did indicate that you were going to explain to the jury why you granted the motion of the co-defendant for a directed verdict. If Your Honor contemplates doing that in the course

206 of your instructions to the jury, may I inquire if we may not have the reason lest the subject be trespassed upon in the course of argument in the case by counsel?

THE COURT: The Court, before counsel make their closing arguments, will advise the jury that the Court disposed of the case against Harry Goldberger as a matter of law by directing that his relationship to the Mercury automobile was of such a nature that liability for its operation did not attach. That will be the limit of the Court's statement.

MR. STEWART: Thank you, Your Honor.

(Whereupon at 10:17 a.m., the jury returned to the courtroom and the following proceedings ensued:)

THE COURT: Ladies and gentlemen of the jury, before counsel in this case begin their closing arguments to you, I want to explain that on Friday at the termination of the plaintiff's case, the Court as a matter of law released from the case Harry Goldberger who had, by the evidence, sold the Mercury automobile to its then operator, Joseph Rivera.

The Court released Mr. Goldberger from the case because of the Court's conclusion as a matter of law that his relationship to the Mer-
207 cury automobile was of such a nature that he was not liable for what occurred in its operation by Mr. Rivera.

At the beginning of the case, you heard that Mr. Goldberger was a defendant. The Court has eliminated or released him from the case and he is no longer of any concern to you.

You may proceed.

(Whereupon, clsoing arguments by counsel for all parties were had, reported but not made a part of this record.)

## CHARGE TO THE JURY

THE COURT: Ladies and gentlemen of the jury, at this point in the trial of this case it becomes the Court's responsibility to instruct you as to the law that will govern you in reaching your verdict in this case and it is, of course, your responsibility to accept the law as it is outlined to you by the Court and to apply the law to the facts as you find them to be in the present case.

I want to point out at the outset in this case that you have heard a number of references to Joseph Rivera who was the operator of the Mercury automobile involved in this accident. Joseph Rivera, the oper-
ator of the Mercury automobile, was not before the Court in this case.
208 You should, therefore, draw no inferences for or against either party by the fact that he did not appear in this case as a party or as a witness, nor should you speculate about the matter of his status in any manner or degree.

The problem that confronts you is to determine, under the Court's instructions, whether there is liability on the part of the remaining defendants who are the Rawlings Truck Line, Incorporated and the driver of the Rawlings Truck Line, John E. Willis.

You will, of course, not be influenced in any way by the fact that the defendant, Rawlings Truck Line, is a corporation because the law recognizes corporations as legal entities, that is, as legal persons and

you should afford to a corporation the same consideration that you would afford to an individual defendant in a particular case.

There is no question but that the defendant John E. Willis, the driver of the truck, was in fact the agent of the Rawlings Truck Line, Incorporated, and there is no question but that he was acting within the course of his employment at the time of this accident. Consequently, the act of John E. Willis is the act of the Rawlings Truck Line, Incorporated, and for practical purposes in considering the conduct of these two defendants,

209 they are actually one. The act of the driver is the act of the company and if you find under the Court's instructions that the driver of the truck is liable, then, of course, the employer is likewise liable.

I want to point out to you at the very outset of these instructions that the closing arguments made by these attorneys this morning are not evidence in the case. These closing arguments are efforts by these men, who are admittedly advocates, who attempt to present their version of the evidence in the way that is most favorable to the client that they represent. Remember, then, that these arguments are not evidence and remember also that the recollections of the attorneys as to the evidence in the case are not binding upon you because it is your recollection and your recollection alone which must guide you in reaching your verdict in the case.

It is your function and your responsibility in this case to resolve the evidence and arrive at what we call the ultimate or the final facts, and then to apply the law as it is given to you by the Court to the facts as you find them in order to do justice between the parties. In this connection you, of course, must weigh the evidence which has been presented here in open court without bias, without prejudice or without sympathy towards one side or the other.

210 As jurors you are the sole judges of the facts. You are the judges of the facts. You must determine what facts have been established. As jurors you are the sole judges of the credibility of the witnesses. This means, of course, that you must determine which of the witnesses you

are going to believe and you must determine to what extent you will believe the testimony of each witness.

In determining how much credence, how much credibility you will give to the testimony of each witness, you have the right to consider the demeanor of the witness on the witness stand, his or her manner of testifying; you may consider whether the witness impresses you as having an accurate memory and recollection of the facts about which he is testifying; you may consider whether the witness displays any favor or prejudice towards the plaintiff or the defendants; you may consider — and I think this is quite important — whether the witness displays any interest in the outcome of the case. In short, you must determine whether each witness impresses you as being a truth-telling individual. You must determine whether the witness makes a favorable impression upon you from the viewpoint of credibility.

If you believe that a witness willfully testified falsely as to any material fact concerning which the witness could not possibly be mistaken,

211 you are then at liberty, if you deem it desirable to do so, to disregard the entire testimony of that witness or any part of the testimony of that witness.

You should not be influenced by the number of witnesses who have testified for one side or the other. In other words, you do not count the witnesses on each side and award your verdict to the side that produces the largest number of witnesses. If that were the measure of liability in cases of this kind, then I am sure you can appreciate that the ingenuity of lawyers would produce the trial of cases in which there would be an endless procession of witnesses to the witness stand. Consequently, you do not count the witnesses but rather you weigh the testimony of each witness.

You should not arbitrarily disregard the testimony of any witness. You are instructed that the testimony of one witness, entitled to full credit, is sufficient for the proof of any fact and may justify a verdict even if a number of witnesses have testified to the contrary if, upon the

whole evidence and considering the credibility of the witnesses as I have outlined that term to you, you should determine that the probability of truth favors the testimony of that one witness.

212 The Court has admitted in evidence in this case the testimony of several doctors, each of whom was recognized by the Court as an expert witness. It is a basic rule of evidence that a witness may not express opinions from the witness stand. Ordinarily, a witness is permitted to testify only as to the facts within his own knowledge, that is, what he saw or heard or felt. An exception is recognized in the case of expert witnesses. Expert witnesses being those persons who have education or experience, or both, in a field in which the average layman has but limited knowledge. When the Court recognizes a witness as an expert witness, he is then permitted to express opinions upon matters in the field of his specialty. As a result, the Court has permitted the several doctors in this case to express opinions to you on medical matters.

It is a rule of our procedure that jurors are not bound to accept the testimony of expert witnesses. I think you can understand the rather obvious reason for this rule, because if you were bound to accept the testimony of these expert witnesses, they would in fact be making findings of fact and that is not the witnesses' function but rather is the exclusive function of the jurors. Do not disregard the testimony of any expert witness arbitrarily but rather consider the witness' training, his background, his experience, his opportunity to qualify himself to express an opinion in

213 a particular case and, in the final analysis, give to the testimony of the expert witness such weight as in your judgment it is solely entitled to receive.

It is your duty and your sole responsibility to resolve any conflicts of evidence in this case.

The burden of proof is upon the plaintiff to sustain his aspects of the case by what we call a fair preponderance of the evidence.

In all cases, civil and criminal, some party must have the burden of proceeding, the burden of proving certain facts; and in our civil cases

of this kind, the burden of proof is upon the plaintiff. The burden of proof is upon this plaintiff to prove his case by a fair preponderance of the evidence.

As counsel suggested in his closing argument, this burden of proof is different in a civil case than it is in a criminal case. In a criminal case, the burden of proof is upon the Government to prove the defendant guilty beyond a reasonable doubt and this, of course, means a very heavy burden. In civil cases, however, the burden of proof upon the plaintiff, I repeat, is to prove his case by a preponderance of the evidence.

214 What does this mean? The term "preponderance of the evidence" means such evidence as when weighed with that opposed to it has the more convincing force.

A party has succeeded in carrying the burden of proof on an issue of fact if the evidence favoring his side of the question is more convincing than that tending to support the contrary side and if it causes you, the jurors, to believe that on that issue, the probability of truth favors that party.

The burden of proof upon this plaintiff, then, is to prove by a preponderance of the evidence that the defendants were negligent and that such negligence was the proximate cause of the injury to the plaintiff.

The law does not permit you to guess or speculate as to the cause of this accident. If the evidence is equally balanced on the issue of negligence or of proximate cause so that it does not preponderate in favor of the party making the charge in the basic case, that is, the plaintiff, of course, the plaintiff has then failed to fulfill his burden of proof.

I have mentioned "negligence" so, naturally, the question must come to your mind: What is negligence? Negligence is the doing of some act which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do actuated by those con-

215 siderations which ordinarily motivate human conduct. Negligence is the failure to use ordinary care in the management of one's property or of one's person.

I must caution you that negligence is not an absolute term but is always a relative one, because the conduct in question must be considered

in the light of all of the circumstances of the individual case. What is negligence under one set of conditions might not be negligence under another set of conditions.

The standard, then, that is established by the law is the standard of conduct of the man of ordinary prudence. The law does not require of any person that he behave in the manner of a man or woman of extraordinary intelligence or a man or woman who is unusually conscientious about recognition of all of his rights and obligations. The standard of conduct in determining whether negligence exists, I repeat, is the standard of conduct of the person of ordinary prudence, the standard that is observed by a man of ordinary prudence in order to avoid harm to himself or to others.

The amount of care and caution which a particular person must observe in an individual set of circumstances varies directly in proportion to the danger known to be involved in that particular situation.

216 I have said that the burden of proof was also upon this plaintiff to prove proximate cause and, again, I must define a phrase to you: The proximate cause of an injury is that cause which in actual and continuing sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred. The proximate cause of an injury, then, is the one that necessarily sets in operation the factors which cause the injury. It may operate directly or by putting intervening agencies in operation. This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one factor, one act, one element or one circumstance, or the conduct of one person. On the contrary, the acts or omissions of two or more persons may work concurrently as the efficient cause of an injury and, in such case, each of the participating acts or omissions is regarded in law as a proximate cause.

Where the negligent acts or omissions of two or more persons, whether committed independently or in the course of jointly conducted conduct, contribute proximately, each of such persons is responsible. This is true regardless of the relative degree of contributions.

In this jurisdiction, we do not observe the doctrine of comparative negligence, which is a doctrine recognized in some jurisdictions especially in automobile accident cases in which the jury is called upon to find,
217 if there is negligence of two or more people, the relative percentage of negligence on the part of each of the participating people and then to award damages upon the basis of the ratio of the relative degrees of proportionate contribution. Our criticism of this doctrine in this jurisdiction is that it requires the jurors to operate with the skill of engineers to utilize slide rules and complicated mathematical formulas in an effort to determine the relative degree of contribution to an injury. Consequently, we do not accept in this jurisdiction the doctrine of comparative negligence.

You are instructed that there may be more than one proximate cause of an accident. If two parties, each by their concurrent acts of negligence proximately cause an accident, either one or both is liable for the full extent of the injuries and damages and the jury must not attempt to apportion the damages. This means that if you should find that the negligence of the defendants Rawlings Truck Line, Incorporated, and John E. Willis was one of two or more proximate causes, then you should not attempt to assess damages against these defendants, Rawlings Truck Line and John E. Willis, for only a fractional share of the damages but you should make one award in one sum without regard to the number of parties whose negligence proxi-
218 mately caused the injuries and damages, which award should fully compensate the plaintiff for all of the injuries and damages sustained that you find or if you find were sustained under the Court's instructions to you.

Both negligence and proximate cause, as I have defined them to you, are requisites for finding liability. The mere fact that an accident happened, considered alone, does not support an inference that some party or any party to the accident was negligent. No presumption of negligence, then, arises from the mere happening of the accident. On the contrary, the legal presumption is that legal care was exercised by all of the parties.

The burden of proof is upon the plaintiff to overcome his presumption of due care on the part of the defendants and to prove by a preponderance of the evidence that the defendants were guilty of negligence and that

such negligence was the proximate cause of the accident.

You are instructed that when a person is using or is about to use the street or highway, either as a pedestrian or as the operator of a motor vehicle, he has a duty to keep a proper lookout and to make reasonable observations as to traffic and other conditions which confront him in order to protect himself and others while using the roadway. What ob-

219 servations he should make and what he should do for his own safety are matters which the law does not attempt to regulate in detail except that it does place upon him the continuing duty to exercise ordinary care to avoid an accident.

The fact that one who has a duty to look testifies that he did look but did not see that which was plainly there to be seen is of no legal significance, for the requirement imposed by law is to look effectually and one who looks and does not see that which is plainly there to be seen is as negligent as one who does not look at all.

You are instructed, with respect to the issue of right of way, for the negligence of a party failing to yield the right of way, that such right of way is relative and not absolute and that you must take into consideration not only who had the technical right of way but the relative distance of the vehicles from the point of the accident, their respective speeds and other prevailing traffic and weather conditions.

You are further instructed that the party having the right of way has the right to assume that the other party will comply with the law and yield to him, but the fact he has a technical right of way does not excuse him from exercising ordinary care to avoid injuries to others.

220 The Court has admitted into evidence several traffic regulations of the District of Columbia. The Court instructs you that the violation of a traffic regulation is negligence per se, that is, negligence as a matter of law.

The Court must point out to you further that negligence of this kind is of no circumstance in your deliberations unless you find that it was a proximate cause of the injuries of which the plaintiff complains.

If your verdict is in favor of the plaintiff, it then becomes your duty to award to the plaintiff such sum as will fairly and reasonably compensate him for all the damages suffered by him which proximately resulted from the negligence of the defendants. Damages, like every other aspect of the case, must be proved by the plaintiff by a fair preponderance of the evidence.

If, then, you find that the plaintiff under the instructions given to you by the Court is entitled to your verdict, you will consider in fixing the amount of the award the elements of damage which I will now enumerate to you:

First, the reasonable value not exceeding the cost to the plaintiff of the examinations, attention and care by physicians and surgeons reasonably required and actually given in the treatment of the plaintiff. Next, you will award to the plaintiff, if you find in his favor, such sum as will

221 reasonably compensate his pain, discomfort and mental anguish suffered by him and proximately resulting from the injuries in question and for such pain, discomfort and mental anguish, if any, as you find he is reasonably certain to suffer in the future from the same cause.

You are instructed that the law allows one injured through the negligence of another compensation in money, not only for his physical pain and suffering but also for mental pain and suffering. By this is meant a recovery for something in addition to the form of mental suffering ordinarily described as physical pain. Mental suffering may arise out of physical injury and depends upon the extent, character and probable duration of that injury. It includes all the numerous forms that mental suffering will take which will vary in each case with the temperament of the individual, his ability to withstand shock, the nature and character of his injuries, whether they are permanent or temporary, whether they are disabling or humiliating, and the mental worry, stress or grief, or mortification which he may sustain thereby.

If the character of the injury be such as to cause one mental anxiety or dread of physical suffering reasonably certain to continue in the future,

you may consider such elements in assessing damages for mental suffering. In estimating such mental suffering, if any such exists, you may
222 also consider whether mental suffering might be sustained by the plaintiff hereby by a deprivation of the measure and satisfaction in life that only those may enjoy who are possessed of a sound body and the free use of all its members.

These are all proper component elements for that mental suffering for which the law entitles one injured by the negligence of another to seek redress in monetary damages.

I repeat, the burden of proof is upon the plaintiff to establish the elements of his damage. This means that if you find for this plaintiff, the amount of your verdict must be based upon the evidence as to his injuries. You should not award the plaintiff speculative damages, that is, compensation for future detriment which, although possible, is remote, conjectural or speculative.

While the amount of your verdict, if you find for the plaintiff, is left to your sound discretion, your award must be just and reasonable and must be based upon the evidence introduced.

I have instructed you on the subject of the measure of damages in this action because it is my duty to instruct you as to all of the law that may become pertinent to your deliberations. I, of course, do not know
223 whether you will need the instructions on damages and the fact that I have given them to you must not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict.

Your verdict must be a unanimous one, which means, of course, that all twelve of you must concur in your verdict.

The Court has admitted in evidence certain exhibits which you may have in the jury room if you want to see them. If you want to see the exhibits, you have but to ask the deputy marshal who will be in attendance at the jury room door for the exhibits and they will be sent in to you.

If in the course of these instructions to you any rule, direction or idea has been stated by me in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason, you should not single out any certain sentence or any individual point or instruction and ignore all the others but you are to consider all of the instructions as a whole and to regard each in the light of all of the others.

It is this Court's practice to caution jurors that if by any chance the Court, the Judge, has said anything or done anything which has suggested to you he is inclined to favor the claims or position of either of
224 the parties, you will not permit yourselves to be influenced by any such suggestions.

We Judges are told from time to time that jurors often watch the Judge and try to get some cue from him as to how he feels about a particular case. We are told that occasionally some jurors keep a mental box score of the Court's rulings on objections to evidence and things of that kind, and they total up the number of rulings favoring one side or the other and try to draw some conclusion that the Court favors one side or the other in the case. Obviously, no Judge has any desire to influence a jury by his own conduct in any way in the trial of a case.

I point out to you, therefore, that I have not expressed nor intended to express, nor have I intimated or intended to intimate any opinion of my own as to what witnesses are or are not worthy of credence or what facts have or have not been established by the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard them.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment. To each of you, I would say that you must decide
225 the case for yourself but you should do so only after discussing it with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. You should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors or any of them favor a particular decision or hold an

opinion at variance with your own. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinions of other jurors.

If I may make a suggestion for what I believe is a very simple method of applying this rather lengthy statement of legal points and principles to the facts in the case, I would suggest that you approach your responsibilities somewhat as follows: Ask yourselves a series of questions.

The first question should be: Were these defendants guilty of negligence, as I have defined that term to you? If your answer to that question is, "No", then you have no further responsibilities and you should return a verdict for the defendants.

If your answer to that question is, "Yes", then you go to a second question: Was this negligence the proximate cause of the injuries to the
226 plaintiff? If your answer to this question is, "No", you find for the defendants.

If your answer to this question is, "Yes", then you proceed to the matter of damages and consider the elements of damage which the Court has enumerated to you and make your award in accordance with the Court's instructions in favor of the plaintiff in a single amount. By that I mean you don't allocate a part of your verdict for medical expenses and another part for pain and suffering, and so on, but rather if you find for the plaintiff, your verdict is in one single sum representing all of the elements of injury which you find to have been established by the evidence.

Will counsel approach the Bench.

(At the Bench:)

THE COURT: I will assume for the record at this point that any motions previously made by the defendants are renewed. The Court will take the same action on any motions which it has previously taken.

The Court will further assume for the record at this point that counsel renews all prior requests for prayers to the jury which were

denied by the Court. The Court will assume for the record that counsel renews all previous objections previously voiced.

227 In connection with the Court's charge to the jury, does the plaintiff request any further charge?

MR. ZITOMER: Only one, Your Honor. In the very last part of Your Honor's charge, you instructed the jury on the approach to the problem and you asked the jury in the second question: Was the negligence of the defendants the proximate cause of the injury? I would ask Your Honor to instruct them that they should ask themselves whether this negligence was a proximate cause of the injury instead of "the".

THE COURT: The Court will so instruct the jury.

Do you have any further requests?

MR. ZITOMER: No, Your Honor.

THE COURT: Do you have any objection to the charge as given?

MR. ZITOMER: No, Your Honor.

THE COURT: Mr. Stewart, do you request any additional charge?

MR. STEWART: No, Your Honor.

THE COURT: Do you have any objection to the charge as given?

MR. STEWART: I object to that portion of Your Honor's charge where you discussed the obligation of a motorist to look and look effectively to see what is there to be seen. That is the duty which our Appel-

228 late Court has said was applicable in intersection accidents, not in a situation in which we are factually concerned here.

THE COURT: Your objection is a matter of record.

Do you have any other objection?

MR. STEWART: I now object in anticipation, Your Honor, to that which Your Honor has indicated you were going to say to the jury because, as I understood what Your Honor was saying, you were talking specifically about negligence of the defendants whom they are charging, so I see no reason for Your Honor being asked to qualify this statement at this time.

THE COURT: Your objection is a matter of record.

Anything more?

MR. STEWART: No, Your Honor.

(In open Court:)

THE COURT: Counsel has pointed out to the Court that in suggesting that you consider the second question, Was the negligence of the defendants the proximate cause of the injury to the plaintiff? the Court more properly should have said, in line with the Court's earlier instruction, Was the negligence of the defendants a proximate cause of the injuries to the plaintiff?

229 Upon reaching the jury room, you will select one of your members to serve as foreman. The foreman will preside at your deliberations and speak for you in advising the Court of your verdict.

At this time, it will be unnecessary for the Court to use the services of the two alternate jurors. I will ask the two alternate jurors to kindly take a seat in the courtroom.

(The alternate jurors complied.)

THE COURT: The jury may retire, Mr. Marshal.

(Whereupon at 12:23 p.m., the jury retired to commence its deliberations.)

MR. ZITOMER: If I may address the Bench, Your Honor: So that we may have a record of the blackboard in the event that either side was to go to Appeals, I have asked a reporter to come here and I would ask Your Honor's permission to have a photographer take a picture of the blackboard during the luncheon recess.

THE COURT: You may do so during the recess.

The Court must point out to you that the blackboard has not been admitted in evidence. If I were given a voice in matters of this kind, I would not permit the use of blackboards in the courtroom. I would declare them as unconstitutional or something to keep them out, because I think you men handicap yourselves tremendously by asking a witness,

230 Was it here? The witness says, No, it was over here. The printed transcript is completely valueless when you use a blackboard. But I have not been able to decrease its popularity by my views.

You may take a photograph of it if you desire.

You gentlemen may be on call if it is convenient if you can be here within a half hour. If the jury does not have a verdict by approximately 4:30, I will discharge them until tomorrow morning. You may be here if you want at that time or if you don't care to be here, the Court will not require you to be here.

(Whereupon at 12:25 p.m., the Court was adjourned for luncheon.)

* * * * *

230a (Whereupon, at 4:24 p.m., the following proceedings ensued out of the presence of the jury:)

THE COURT: In the case of David M. Williams versus the Rawlings Truck Line, the Court, shortly after luncheon, received the following note from the jury:

"Jury requests pictures and pertinent traffic regulations."

The Court sent the several photographs which had been admitted in evidence in to the jury and caused to be typed the provisions of those sections of the traffic regulations which had been admitted in evidence, to wit, and meaning thereby as lawyers are prone to say, Sections 22(c), 39(a), 47(b) and 143(a) which were the sections that have been admitted as to the defendants.

(Whereupon, the jury returned to the courtroom.)

* * * * *

230 (Whereupon, at 4:26 p.m., the jury returned its verdict in favor of the defendants, and the jury was polled.)

(Whereupon, the following proceedings ensued:)

THE COURT: Thank you, ladies and gentlemen of the jury. I know you have given very careful attention to this case. I fully understand your verdict.

It is my impression, which I will tell you now that the case is over, that the accident was caused by Rivera turning directly in the path of this

231 truck. I am convinced that that is the unfortunate circumstance.

The parties, both the plaintiff and the defendants, have been embarrassed in this case in that they have been unable to find Rivera. He could not be located for service. They couldn't bring him before the Court and, consequently, everyone has been handicapped by his absence. I have felt from the testimony certainly he was the one that should have been here in court defending this case, and I think your verdict gives some reassurance that maybe the Court was thinking correctly in this case.

I know the parties are grateful to you for your careful consideration.

You are excused now to return to the juror's lounge tomorrow morning at 9 a.m.

Thank you.

(Whereupon, the trial in the above matter was concluded.)

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[Filed May 25, 1964]

## TRAFFIC & MOTOR VEHICLE REGULATIONS

**Sec. 21. Reckless Driving**

(a) Any person who drives any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving. (Title 40, Sec. 605. (b), 1951 D.C. Code.) (C.O. No. 57-1086)

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## ARTICLE VI. SPEED RESTRICTIONS

**Sec. 22. Speed Restrictions**

(a) No person shall drive a vehicle on a street or highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then

existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the street or highway in compliance with legal requirements and the duty of all persons to use due care.

* * * * *

(c) The driver of every vehicle shall, consistent with the requirements of (a), drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.

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## ARTICLE VIII. TURNING AND STARTING AND SIGNALS ON STOPPING AND TURNING

### Sec. 36. Required Position and Method of Turning at Intersections

* * * * *

(b) Approach for a left turn from a two-way street into a two-way street shall be made in that portion of the right half of the roadway nearest the center line thereof and after entering the intersection the left turn shall be made so as to leave the intersection to the right of the center line of the roadway being entered.

- - - - - - - - - - -

### Sec. 38. Starting Parked Vehicle

No person shall start a vehicle which is stopped, standing or parked unless and until such movement can be made with reasonable safety. (C.O. No. 59-315)

- - - - - - - - - - -

**Sec. 39. Turning Movements and Required Signals**

(a) No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in Section 36, or turn a vehicle to enter a private road or driveway or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety. No person shall so turn any vehicle without giving an appropriate signal in the manner hereinafter provided in the event any other traffic may be affected by such movement.

(b) A signal of intention to turn right or left when required shall be given continuously during not less than the last 100 feet traveled by the vehicle before turning.

- - - - - - - - - - -

**Sec. 40. Signal by Hand and Arm or Signal Device**

(a) Any stop or turn signal when required herein shall be given either by means of the hand and arm or by a signal lamp or lamps or mechanical signal device, except as otherwise provided in paragraph (b).

- - - - - - - - - - -

**Sec. 47. Vehicle Turning Left at or Between Intersections**

* * * * *

(b) The driver of a vehicle intending to leave a public highway by turning left between intersections shall yield to any vehicle approaching from the opposite direction which is so close as to constitute an immediate hazard, but said driver having so yielded and having given a signal as required by law, may make such left turn and other vehicles approaching from said opposite direction shall yield to the driver making such left turn.

- - - - - - - - - - -

**Sec. 99. Obstruction to Driver's View or Driving Mechanism**

* * * * *

(c) An operator shall, when operating a vehicle, give his full time and attention to the operation of the same.

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**Sec. 132. Signal Lamps and Signal Devices**

* * * * *

(b) Any motor vehicle may be equipped and when required by these regulations shall be equipped with lamps showing to the front and rear for the purpose of indicating an intention to turn either to the right or left. When lamps are used for such purposes, the lamps showing to the front shall be located on the same level and as widely spaced laterally as practicable and when in use shall display a white or amber light, or any shade of color between white and amber, visible from a distance of not less than 100 feet to the front in normal sunlight, and the lamps showing to the rear shall be located at the same level and as widely spaced laterally as practicable and when in use shall display a red or amber light, or any shade of color between red and amber, visible from a distance of not less than 100 feet to the rear in normal sunlight. When actuated, such lamps shall indicate the intended direction of turning by flashing the light showing to the front and rear on the side toward which the turn is made. (C.O. No. 58-497)

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**Sec. 143. Horns and Warning Devices**

(a) Every motor vehicle when operated upon a highway shall be equipped with a horn in good working order and capable of emitting sound audible under normal conditions from a distance of not less than 200 feet, but no horn or other warning device shall emit

an unreasonably loud or harsh sound or a whistle. The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn but shall not otherwise use such horn when upon a highway. (C.O. No. 56-2045)

- - - - - - - - - - -

**Sec. 146. Windshields Must Be Unobstructed and Equipped with Wipers**

* * * * *

(c) Every windshield wiper shall be maintained in good working order.

(d) No motor vehicle shall be operated when the windshield is so cracked, scarred, clouded, or otherwise defective, as to obstruct vision.

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PLAINTIFF'S PRAYER No. 1

You are instructed that the law allows one injured through the negligence of another, compensation in money, not only for his physical pain and suffering, but also for mental pain and suffering. By this is meant a recovery for something in addition to the form of mental suffering ordinarily described as "physical pain".

Mental suffering may arise out of the physical injury and depends upon the extent, character, and probable duration of the injury. It includes all the numerous forms that mental suffering will take which will vary in each case with the temperament of the individual, his ability to stand shock, the nature and character of his injuries, and whether permanent or temporary, disabling or humiliating, and the mental worry, stress, or grief or mortification which he may sustain thereby.

If the character of the injury be such as to cause one mental anxiety, or dread of physical suffering reasonably certain to continue in the future, you may consider such elements in assessing damages for mental suffering.

In estimating such mental suffering, if any such exists, you may also consider whether or not mental suffering might be sustained by the plaintiff hereby by a deprivation of the pleasure and satisfaction in life that only those can enjoy who are possessed of a sound body and the free use of all its members.

These are all proper component elements for that mental suffering for which the law entitles one injured by the negligence of another to seek redress in monetary damages.

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## PLAINTIFF'S PRAYER NO. 2

The right of way of any motorist is not absolute. Where he makes a signal or indication that he is about to move from a straight course upon the highway, he must, in the operation of his vehicle, consider that others on or near the highway may have seen the signal and that their actions may be affected. His right of way under those circumstances is qualified by a duty to be on the alert for anyone who may have been affected by the signal so given, particularly if the signal, having been given, is not executed; and to so control his vehicle or give warning, or both, so as to avoid colliding, in accordance with his duty to use reasonable care under the circumstances.

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## PLAINTIFF'S PRAYER NO. 3

If a motorist's failure to have knowledge is due to his negligence, in other words, if a motorist fails to keep a proper lookout and had he kept a

proper lookout he would have seen the situation, then he is responsible to the same extent as if he had actually seen. So, if a witness testifies that he looked and didn't see, and you are satisfied from the evidence that had he looked he would have seen, then you may infer that he did not look.

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## PLAINTIFF'S PRAYER NO. 4

Joseph Rivera, the operator of the Mercury, was not a party to this case. The record indicates that there was an attempt to find him which failed. You should therefore draw no inferences for or against either party by the fact that he did not appear in this case as a party or as a witness; and that he is not a party should not in any way effect your determination of the issues of liability and of damages which remain against Rawlings Truck Lines, Inc., and John E. Willis; nor should you speculate about the matter for that is entirely unrelated to your consideration of this case.

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## PLAINTIFF'S PRAYER NO. 5

You are instructed that there may be more than one proximate cause of an accident. It two parties, each by their concurrent acts of negligence proximately cause an accident, either one or both is liable for the full extent of the injuries and damages and you will not attempt to apportion the damages. By that, the Court means, that if you should find that the negligence of the defendants Rawlings Truck Lines, Inc., and John E. Willis, was one of two or more proximate causes, then you should not attempt to assess damages against these defendants Rawlings Truck Lines, Inc., and John E. Willis for only a fractional share of the damages, but you should make one award in one sum without regard to the number of parties whose

negligence proximately caused the injuries and damages, which award should fully compensate the plaintiff for all of the injuries and damages sustained.

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[Filed January 24, 1964]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 23rd day of January, 1964, before the Court and a jury of good and lawful persons of this district, to wit:

* * * * *

who, after having been duly sworn to well and truly try the issues between David M. Williams, plaintiff and Rawlings Truck Line, Inc., John E. Willis and Harry Goldberger, defendants and after this cause is heard and given to the jury in charge, they upon their oath say this 24th day of January, 1964, that they find for the defendant, Harry Goldberger against said plaintiff, by direction of the Court.

WHEREFORE, it is adjudged that said plaintiff take nothing by this action, that said defendant Harry Goldberger go hence without day, be for nothing held and recover of plaintiff his costs of defense.

HARRY M. HULL, Clerk,

By /s/ Dean F. Miller
Deputy Clerk

Judge EDWARD A. TAMM
Presiding.

(N)

---

[Filed January 24, 1964]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 23rd day of January, 1964, before the Court and a jury of good and lawful persons of this district, to wit:

* * * * *

who, after having been duly sworn to well and truly try the issues between Rawlings Truck Line, Inc. and John E. Willis, 3rd Party plaintiffs, and Harry Goldberger, 3rd Party defendant and after this cause is heard and given to the jury in charge, they upon their oath say this 24th day of January, 1964, that they find for the 3rd Party defendant against said 3rd Party plaintiffs, by direction of the Court.

WHEREFORE, it is adjudged that said 3rd Party plaintiffs take nothing by this action, that said 3rd Party defendant go hence without day, be for nothing held and recover of 3rd Party plaintiffs his costs of defense.

HARRY M. HULL, Clerk,
By /s/ Dean F. Miller
Deputy Clerk.

Judge EDWARD A. TAMM
Presiding.

(N)

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[Filed January 27, 1964]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 23rd day of January, 1964, before the Court and a jury of good and lawful persons of this district, to wit:

* * * * *

who, after having been duly sworn to well and truly try the issues between David M. Williams, plaintiff and Rawlings Truck Line, Inc. and John E.

Willis, defendants and after this cause is heard and given to the jury in charge, they upon their oath say this 27th day of January, 1964, that they find for the defendants against said plaintiff.

WHEREFORE, it is adjudged that said plaintiff take nothing by this action, that said defendants go hence without day, be for nothing held and recover of plaintiff their costs of defense.

HARRY M. HULL, Clerk,

By /s/ Dean F. Miller
Deputy Clerk.

Judge EDWARD A. TAMM
Presiding.

(N)

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[Filed February 24, 1964]

NOTICE OF APPEAL

Notice is hereby given this 24th day of February, 1964, that DAVID M. WILLIAMS, plaintiff, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 24th day of January, 1964 in favor of Harry Goldberger against said David M. Williams; and the judgment of this Court entered on the 27th day of January, 1964, in favor of RAWLINGS TRUCK LINE, INC., and JOHN E. WILLIS against David M. Williams.

/s/ Joseph Zitomer
Attorney for Plaintiff

* * *

* * * *

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BRIEF FOR APPELLEES
RAWLINGS TRUCK LINE, INC. and JOHN E. WILLIS

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,648

DAVID M. WILLIAMS,

*Appellant,*

v.

RAWLINGS TRUCK LINE, INC.,
JOHN EDWARD WILLIS
and
HARRY GOLDBERGER,

*Appellees.*

Appeal from the United States District Court
for the District of Columbia

WILLIAM E. STEWART, JR.
RICHARD W. GALIHER
WILLIAM H. CLARKE
JOHN H. VERCHOT
1215 - 19th Street, N. W.
Washington, D. C.
*Attorneys for Appellees,*
*Rawlings Truck Line, Inc. and*
*John Edward Willis*

*Of Counsel:*
GALIHER, STEWART & CLARKE

## QUESTION PRESENTED

In the opinion of the Appellees, Rawlings Truck Line, Inc. and John E. Willis, the question is:

In the opinion of Appellees, Rawlings Truck Line, Inc. and John E. Willis, the sole question, as to them, involved herein is: did the verdict of the jury absolving these Appellees of liability constitute a final resolution of the issues of fact created in the record by conflicting testimony?

# INDEX



## TABLE OF CASES

OTHER AUTHORITIES



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* Cases or authorities chiefly relied upon are marked by asterisks.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 18,648

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DAVID M. WILLIAMS,

*Appellant,*

v.

RAWLINGS TRUCK LINE, INC.,
JOHN EDWARD WILLIS

and

HARRY GOLDBERGER,

*Appellees.*

---

Appeal from the United States District Court
for the District of Columbia

---

## BRIEF FOR APPELLEES,

## RAWLINGS TRUCK LINE, INC.
## and
## JOHN EDWARD WILLIS

---

## COUNTER-STATEMENT OF THE CASE

These Appellees deem it necessary to include in this brief a Counter-Statement of the case so that this Court will have before it,

in concise form, all facts material to a consideration of the question presented, as distinguished from conclusions and opinions and even assumptions, as set forth in Appellant's Statement of the Case. Appellant has suggested in the first two sentences of his Statement of the Case a description of the accident involved herein, which represents truly an assumption on the part of Appellant or otherwise stated, his theory as to what the evidence showed but this is the theory that was rejected by the jury in its examination of the over-all evidence. Consequently, Appellant, it is respectfully suggested, has used this portion of his brief for argument.

Police Officer Allen Nairn approximated the time of the accident as 10:00 P.M. and his arrival at the scene within twenty minutes thereafter (J.A. 30, 33). This accident occurred on New York Avenue N.E. (U.S. Route #1) at a point east of 16th Street and the speed limit in the area is 30 miles per hour (J.A. 30, 34). It was still raining at the time of the officer's arrival and this was a heavily traveled section, particularly on weekends (J.A. 34). The photographs of the two vehicles involved show the position of the vehicles at rest after the impact and of course do not depict the vehicles at point of impact (J.A. 36). Officer Nairn could not fix the point of impact but did testify that the point of impact was pointed out to him by a gasoline station attendant at the Sunoco Station and this point was 16 feet east of the west driveway of the gasoline station and 3 feet north of the south curb of New York Avenue (J.A. 31). The officer further testified that the Appellee, Willis, told him that he had been driving east on New York Avenue and had passed a truck that was parked just west of the intersection of 16th Street and that in doing so, he had put his right-turn signal on to pull back into the curb lane; that when he was about 15 feet away, the automobile in which Appellant was riding made a left turn in front of his truck and the collision occurred (J.A. 32). The width of New York Avenue at the point of the collision was 52 feet (J.A. 30).

The Appellant, in the company of four other marines, was traveling from the New York area back to camp after a weekend leave (J.A. 25, 26). Because gasoline was needed and a switch in drivers was desired, the car in which Appellant was riding was going to enter a gasoline station on New York Avenue, near 16th Street. This car was traveling in a westerly direction on New York Avenue and intended to turn left (southward) to enter a gasoline station located on the south side of the highway (J.A. 27). Appellant indicated that it was raining "pretty hard and there was some traffic coming the other way," as they neared the point where the turn was to be executed. Appellant first saw the vehicle of Appellees when Joseph Purcell, seated in the front and to his right, yelled, "to look out" and as he turned, he saw a yellowish-orange blinker going on and off and the truck hit the car (J.A. 27).

Appellee, John E. Willis, testified that the truck he was operating was in good operating condition and was equipped with windshield wipers, as well as turn signals. On the date of the accident, he was driving this truck from Emporia, Virginia, carrying a load of lumber on the trailer unit, to Philadelphia, Pennsylvania (J.A. 38, 92). This was a tractor-trailer unit equipped with headlights, 4 lights on the top of the cab of the tractor and 2 more on the corners of the trailer (J.A. 92). It was raining very hard at the time of the accident (J.A. 92). The turn signals on the truck must be manually operated, both to turn on the signal and to turn the same off (J.A. 39). The tractor-trailer unit was being operated in the right-hand lane (curb) on New York Avenue and remained in that lane until Appellee had to pull out into the left lane in order to pass a car, which was parked on New York Avenue by a cafeteria located just west of 16th Street (J.A. 40). Appellee estimated that the cafeteria was located about a quarter of a block west of 16th Street (J.A. 40). It was not his intention to turn at 16th Street but rather to continue straight forward (J.A. 41). After pulling out to the left to pass the parked car, the tractor-trailer unit was guided back into the right lane and the signal indicating the movement of the tractor-trailer from the left lane back into the right

lane was turned off (J.A. 41). The tractor-trailer unit continued straight forward for a distance of approximately a quarter of a block in the lane with the signal light turned off (J.A. 42, 92). At this time, there were cars ahead of the truck that had passed the truck, traveling eastward and there was traffic traveling in the opposite direction (J.A. 92). The brakes of the tractor-trailer were applied before the impact (J.A. 93). The Appellee, in response to questions respecting his previous testimony by deposition, as to whether or not he had eaten in Fredericksburg, indicated that he could not recall "all those incidents at that time" (J.A. 47). Appellee further testified that on the morning preceding his testimony, he had visited the scene of the accident and had been able to associate the location of the cafeteria and of course, the position of the parked car referred to in his testimony to same and the scene of the accident (J.A. 49). Appellee, in response to intensive questioning as to the footage which he could see in front of him as he approached the point of the accident, indicated he was looking straight ahead, saw other traffic ahead and traveling eastward (J.A. 60, 61).

The witness, Joseph John Purcell, who served in the Marine Corps with Appellant and was a fellow passenger in the car driven by Joseph Rivera and who was also a client of appellant's attorney, indicated that he had visited the scene of the accident the evening before his testimony was given (J.A. 61, 62, 72, 73). In doing so, he had paced off the width of 16th Street to be 38 feet. He described the private automobile in which he was riding stopping in the center of New York Avenue and waiting for traffic to pass that was traveling in the opposite direction so that the car could be turned left and travel across the eastbound lanes and enter a Sunoco service station (J.A. 64). He further testified that he first observed the tractor-trailer unit at a point 100 feet west of 16th Street, traveling eastward with its "right-hand blinker on" and it appeared to him that the tractor-trailer had slowed down as it approached the corner with its wheels starting to turn. At this point, he momentarily glanced ahead and

then back again to his right, at which time the truck was only 10-15 feet from the car and the collision followed (J.A. 64). He also testified that Joseph Rivera, the driver of the car, got out of the car and yelled, "I saw your blinker, I saw your blinker. Why didn't you make the turn?"

The sidewalk immediately east of the roadway of 16th Street is about 15 feet in width and from that point to the middle of the driveway of the service station is an additional 16 feet (J.A. 67). The speed of the tractor-trailer, when first observed by the witness, was estimated at 25 miles per hour and when secondly observed, just prior to the accident, was about 20 miles per hour. The blinking light on the right corner of the tractor was on from the time the tractor-trailer unit was first seen until the collision of the vehicles (J.A. 68, 69). The witness did not know whether the blinker was on after the collision (J.A. 69). The witness thereafter testified that he did not know whether the blinker was on at the time of the collision (J.A. 69). The witness saw that traffic traveling eastward on New York Avenue was traveling in three lanes and he did not see any parked vehicle along the highway even though he could see a distance of two blocks (J.A. 70). The witness reiterated that the tractor-trailer traveled an over-all distance of some 150 feet approximately from the time he saw the tractor-trailer while the private automobile traveled a distance of about 45 feet in attempting to make its left turn. The automobile approached the driveway at approximately the center rather than to one side or the other (J.A. 77).

Following the completion of the evidence and full argument of the case by counsel to the jury and the instructions by the Court to the jury, the jury resolved all issues of fact by its verdict in favor of Appellees.

## RULES INVOLVED

### FEDERAL RULES OF CIVIL PROCEDURE

### RULE 51

**Instructions to Jury: Objection**

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

### RULE 61

**Harmless Error**

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

## SUMMARY OF ARGUMENT

The burden of proof rested upon Appellant to establish negligence on the part of Appellees. The case was fully tried before a jury, with Appellant's theory that the use of a turn signal compels a turn from the highway being fully argued to the jury. The jury obviously found from the over-all evidence that there were certain conflicts in the testimony which they resolved in their general verdict for Appellees.

The charge of the Court to the jury, considered as a whole, correctly stated the law applicable to the issues created by the evidence.

## ARGUMENT

### I. THE ALLEGED FALSE AND MISLEADING SIGNAL.

Appellant states in his Summary of Argument that, "The principal issue in this case was the negligence arising out of a false, or misleading turn signal made by the truck." This was Appellant's theory, which he expressed through counsel, in his opening statement and final argument to the jury, neither of which is a matter of record before this Court. Apparently, the jury was more practical in analyzing the use of a turn signal on the highways of today. Though Appellant would deny it. it follows that Appellant is really arguing that if a motorist uses a turn signal and fails to turn from the highway on which he is traveling, that he is guilty of negligence. Undoubtedly, the jurors, in the application of their own practical experience, were well aware of the value of a turn signal on the modern automobile and that the use of same for purposes other than turning off the highway are acts of courtesy and safety. There was no contention made that the turn signal installed on the tractor-trailer unit of Appellees was in violation of the traffic regulation providing for such signals. The Trial Court properly observed that Section 132 of the Traffic Regulations merely provided a norm or standard and that there was no evidence to support a contention that such standard was violated. The dispute that existed in the evidence in this case was whether or not the turn signal was turned off prior to the happening of the accident and in fact, prior to the time that the tractor-trailer reached the intersection of 16th Street. Appellant and his passenger indicated by their testimony that the light was still blinking just prior to the moment of impact, whereas Appellee testified that after using the turn signal to pass to the left of a vehicle parked along the curb about a quarter of a block from the intersection of 16th Street and then using it to change back

to the right-hand lane, he turned the signal off. Thus, a sharp issue was created by this conflict in testimony, which was solely within the province of the jury for resolution. Just how the jury resolved that issue cannot be stated for their verdict was general. Even if they accepted the testimony of Appellant and his fellow passenger, they certainly were not compelled to conclude, as Appellant suggests, that this constituted an act of negligence. Perhaps the jury was more impressed, knowing as they did know from the evidence, that this was a dark rainy night and that Appellant's host-driver, intending to make a left-hand turn across three lanes of a busy interstate highway, saw or should have seen the tractor-trailer, loaded with lumber, approaching at a speed of 20-25 miles per hour and that the host-driver should have remained at a standstill until the truck had passed or, adopting Appellant's argument, actually commenced a turn into the cross street rather than assuming that this might be done and attempting to dart across in the path of the truck. As is to be found in so many of these cases, the parties and witnesses do express estimates of distance and time but these of course are not necessarily to be accepted as factual for throughout the testimony of all is the very clear indication that this accident, like most accidents, developed and happened very suddenly.

On this same subject, Appellant argues that evidence of the host-driver's statement, as to his assumption of what the truck driver intended to do, was excluded from evidence and in effect, unknown to the jury. This does not appear to be quite accurate. The Court will note that the witness, Joseph Purcell, actually volunteering such testimony, gave a general description of the accident as it developed, which included the statement, "And the next thing I remember was the car stopped and Joseph Rivera was outside the car screaming, 'I saw your blinker, I saw your blinker. Why didn't you make the turn?'" (J.A. 64). It is true of course that objection was thereafter voiced and the objection was sustained but the testimony was not stricken nor the jury instructed to disregard same. It is also true that a further effort on the part of Appellant

to have the same evidence repeated was thwarted by Appellees' objection. Of course, in addition to this testimony of the witness, Purcell, the jury also had before it the testimony of Appellant, to the effect that immediately before the collision and at the time of same, he saw the turn signal on Appellees' truck blinking on and off, indicating a right turn. Certainly, Appellant will concede in this Court, that in his closing argument to the jury, he vigorously pressed this point and argued the right of his client to assume that the tractor-trailer was going to turn right. The combination of the testimony of Appellant and the witness, Purcell, entitle Appellees to suggest to this Court that if an error was committed in the rejection of further evidence on this subject, by way of repetition of the statement of Rivera as a res gestae statement, that the error was harmless and certainly not prejudicial to Appellant.

In the case of *Smith v. Doyle,* 69 App. D.C. 60, 98 F.2d 341, this Court, commenting upon the admission of certain evidence which was really cumulative, had this observation to make at page 61 of the opinion:

> "But we need not rule upon the point for even if there was error in the admission of the speed testimony to which Appellants objected, it was harmless. We are to decide the appeal 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' 40 Stat. 1181, c. 48; 28 U.S.C.A. § 391. 'A circumstance of necessary rules of evidence can exist and be obeyed without affixing indiscriminately to every contravention of them the monstrous penalty of a new trial.' 1 Wigmore, Evid. (2 ed. 1923), § 21."

Strikingly similar and in full support of Appellees' position herein is the case of *Eckis v. Graver Tank & Mfg. Co., Inc.* (C.C.A. 9th, Apr. 25, 1961), 289 F.2d 335. In that case, which involved a collision between a truck and an automobile, during the course of the trial, the investigating police officer testified with respect to the point of impact of the vehicles. Under Oregon law, situs of the accident, such testimony is inadmissible. On appeal, it was held, beginning at page 337 of the Court's opinion:

"We do not resolve this question here because the instant case must be affirmed on another ground. Rule 61, of the Federal Rules of Civil Procedure, 28 U.S.C.A., states in relevant part: 'No error in either the admission or the exclusion of evidence * * * is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.'

"As we have noted, prior to the time Officer Nichols gave his express opinion as to the point of impact, he testified that he had formed such an opinion from certain conditions he had observed and he discussed those conditions in detail, expressing several opinions regarding the point of impact in doing so . . . .

"Officer Nichols had effectively expressed his opinion as to the point of impact before any objection was made. It will be seen that he said he had formed an opinion from the dirt, oil, and water spots on the pavement, that all of these spots were on the truck side (east side) of the road, and that the dirt spots were especially significant since dirt falls straight down upon impact. The answer to the question objected to was only a cumulative statement of the other testimony he had given before the jury without objection. Under such circumstances if it was error to admit the answer to the general question calling for an opinion the error was not prejudicial, and Appellant was not thereby deprived of substantial justice. See *Molesworth v. Capital Transit Co.*, 1954, 97 U.S. App. D.C. 216, 214 F.2d 860; *Smith v. Doyle*, 1938, 69 App. D.C. 60, 98 F.2d 341."

II. ALL RELEVANT TRAFFIC REGULATIONS OFFERED BY THE PARTIES WERE RECEIVED IN EVIDENCE AND/OR THE SUBJECT MATTER OF SAME WERE COVERED BY THE COURT'S INSTRUCTIONS TO THE JURY.

An examination of the various traffic regulations considered and acted upon by the Trial Court, as set forth at pages 9-12 of Appellant's brief, will satisfy this Court that all regulations relevant to the issues

created by the evidence were in fact received in evidence by the Trial Court. It matters not whether at the time of admission into evidence regulations were offered by one party or the other. It was quite apparent that there was no evidence of record to support an admission of a regulation dealing with the subject of reckless driving. The regulations offered in evidence defining the manner in which a signal for a turn might be given were not pertinent but in any event, their exclusion did not eliminate from the jury's consideration the Appellant's contention that such a signal, with its consequent intention as interpreted by Appellant, was in fact given by the truck driver. The traffic regulation (Section 132) relative to signal lamps and devices merely established a standard, which it was not contended by anyone had been violated nor was there any evidence supporting admission of Section 146 requiring that windshields be unobstructed and equipped with wipers. The remaining regulation (Section 99) was no more than a general statement of the obligation of each motorist to be observant. Such a general statement can neither add nor subtract from any given case but in any event, the instructions of the Court respecting the obligation of motorists to look observantly adequately covered the subject matter. It will be noted that the traffic regulations received in evidence covered the subject matter of speed and traveling at reduced speed in the face of special hazards; the turning of a vehicle and the right of way under the regulation possessed first by the vehicle operator intending to continue straight and thereafter, that of the operator of the vehicle making the turn; lastly, the regulation respecting the requirement of a horn and its appropriate use was received.

There is no question but that those regulations received in evidence fully explained the right of way of the vehicle in which Appellant was a passenger under certain factual circumstances, should the jury conclude that those facts had been established. Appellant is apparently attempting to argue that the use of the right-hand signal by Appellee, Willis, at a point when he was approaching 16th Street, irrespective of the purpose of

the use of same, forfeited the right of way, which the vehicle had at or near the intersection and at the driveway immediately east of the intersection. There is no support for this contention in any one of the traffic regulations proffered by Appellant and it is respectfully suggested that such assumption on the part of Appellant on the streets of a city and in particular, on a highway, is an extremely impractical and dangerous way to operate an automobile. Appellees respectfully suggest that it is a matter of common knowledge that turn signals are in daily and common use by motorists both on city streets and highways for many purposes other than turning off a given street. The double-parked vehicle, with its flashing signal indicator, is a frequent sight on downtown streets. The flashing signal indicator both on city streets and on highways is a frequent sight where the operator is moving from one lane into the other, either before or after passing an obstruction or another vehicle. In conclusion, respecting this subject matter, it might be further pointed out, that those regulations respecting turning movements, as offered by Appellant and rejected by the Court, are by their very language predicated upon the basis that compliance therewith must be made in the instance of an intention on the part of the particular motorist to turn right or left. The only testimony with respect to the intention of the tractor-trailer operator was his own and that was unequivocal, it was his intention to continue on Route #1, without turning, until he reached Philadelphia.

## III. THE CHARGE OF THE COURT TO THE JURY COVERED THE ISSUES IN THE CASE AND THE LAW APPLICABLE.

Appellant complains of the refusal of the Trial Court to grant Plaintiff's prayer No. 2. The trial of this case commenced on Thursday, January 23. At the conclusion of the evidence, the Court recessed late in the afternoon of Friday, January 24, suggesting to counsel, after a general discussion of what the Court's charge would contain, that on the following Monday counsel submit to the Court a suggested statement for

the Court to make to the jury on the question of Rivera's absence from the case. On Monday, January 27, 1964, however, Appellant's counsel handed the Court Plaintiff's requested prayer No. 2, as well as others, and the Court observed, "I thought we disposed of prayers on Friday" (J.A. 97). This prayer was denied by the Court in the form submitted but in arguing to the Court its propriety, Appellant's counsel stated that the prayer was "prepared under the general duty of a driver to exercise due care under all of the circumstances . . . ." An examination of the Court's charge reflects the standard definitions of the terms negligence and proximate cause and also a definition of ordinary care and an explanation of how that degree of care would vary in proportion to the danger known to be involved. The instruction also included a statement of the requirement as to both motorists to keep a proper lookout and of the continuing duty of each motorist to exercise ordinary care to avoid an accident. The jury was further told that the law requires that one look effectively and that one charged with the duty of observation, who fails to see that which is plainly visible, is as negligent as one who did not see at all. The Court also explained that with respect to the issue of right of way, that this was relative and not absolute and that it was the jury's function to take into consideration all factual matters relating to the accident and that even though one motorist may have had the technical right of way, this does not excuse him from exercising ordinary care. These parts of the charge referred to above are specifically mentioned for Appellant seems to suggest that the subject matters were not covered in the Court's charge. The Trial Court also made it clear to the jury in its charge, that the Court did not intend to influence the jury by word or action as to the feelings or opinion of the Court in the instant case. Thus, Appellees respectfully suggest to this Court that all of the issues were, indeed, fully and adequately covered by the Court's charge in an impartial fashion.

Furthermore, with respect to the rejected Plaintiff's prayer No. 2, the Court's attention is invited to the case of *Lippman, et al. v. Williams,* 79 U.S. App. D.C. 334, 147 F.2d 150. An appeal was taken in that case based upon the rejection by the Court of certain instructions requested by Appellant. The case involved the fall of a customer in a millinery store and the Appellant contended that after being seated in the store, she had asked to see a hat in the window; in fact, she was shown several hats, which were removed from drawers of cabinets near where Appellant was seated. Thereafter, she got up from the chair and walked into and fell over an open drawer. At page 335 of this Court's opinion, it is stated:

> "The second instruction asked for would have told the jury that Appellant 'had a right to rely upon the aisle or passageway being free from obstruction and safe for pedestrians lawfully there.' Assuming for the purposes of this case that the open wall-drawer was an obstruction in the 'aisle or passageway' which does not necessarily follow, the instruction contained only a partial statement of the rule, in that it ignored the duty of Appellant to exercise ordinary care for her own protection. Appellee was under no legal duty to prevent a careless person from injuring himself."

It is suggested that Plaintiff's prayer No. 2 is likewise defective, as was the requested instruction in *Lippman, et al. v. Williams,* cited *supra,* for this prayer likewise fails to include the obligation of anyone other than the Appellee to exercise care for his own safety and that of his passengers.

Perhaps the language employed by the Court in its charge was not completely to the liking or choosing of Appellant but there is certainly no requirement of this. In the case of *Cohen v. Evening Star Newspaper Co.*, 72 App. D.C. 258, 113 F.2d 523, this Court stated, at page 258:

> "A party has no vested interest in any particular form of instruction.[1] This is true, even though the

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[1] Ayers v. Watson, 137 U.S. 584, 601, 11 S. Ct. 201, 34 L.Ed. 803. See Gassenheimer v. United States, 26 App. D.C. 432, 446; Shettel v. United States, 72 App. D.C. 250, 113 F.2d 34, decided June 10, 1940.

> proffered prayer may be unobjectionable itself, standing alone, as a statement of law.[2] What the language of the instruction shall be is for the trial judge to determine.[3] If, on examination of the entire charge, it appears that the jury has been fairly and adequately instructed, the requirements of the law are satisfied.[4]"

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[2] Redman v. Smith, 51 App. D.C. 131, 277 F. 533; Utah Power & Light Co. v. Woody, 10 Cir., 62 F.2d 613.

[3] Ayers v. Watson, 137 U.S. 584, 601, 11 S.Ct. 201, 34 L.Ed. 803; Washington Times Co. v. Murray, 55 App. D.C. 32, 34, 209 F. 903, 906.

[4] McCartney v. Holmquist, 70 App. D.C. 334, 337, 106 F.2d 855, 858, 126 A.L.R. 375; Redman v. Smith, 51 App. D.C. 131, 277 F. 533.

As stated in the case of *Danzansky v. Zimbalist,* 70 App. D.C. 235, 105 F.2d 457, at page 237:

> "It is axiomatic that the charge must be read as a whole with the view of determining the impression thereby conveyed to the jury." (Cases cited)

Though Appellees recognize the right of Appellant, on the basis of the record before this Court, to contend that the Trial Court erred in refusing to grant Plaintiff's prayer No. 2, Appellees do not believe that Appellant has, on the record, properly objected to any other portion of the Trial Court's charge and therefore not entitled to seek review of same. The Court's attention is directed to the fact that following the charge of the Court to the jury, counsel was asked as to whether any further charge was requested and Appellant did request a clarification as to the subject matter of proximate cause, which was complied with by the Trial Court. Then the Court inquired of Appellant's counsel,

> "Do you have any further requests?
>
> "Mr. Zitomer: No, your Honor.
>
> "The Court: Do you have any objections to the charge as given?
>
> "Mr. Zitomer: No, your Honor." (J.A. 114)

In support of this contention, Appellees rely upon the case of *Ersler v. T. F. Schneider Corp., et al.*, 88 U.S. App. D.C. 371, 188 F.2d 1022, where at page 371, this Court stated:

> "As for the law, it was covered in the court's charge to the jury in substantial accord with instructions requested in behalf of plaintiff. In any event, there was no objection to any part of the charge. Under those circumstances, we do not now feel justified in reviewing it. Fed.R.Civ.P. 51, 28 U.S.C.A.; *Palmer v. Hoffman*, 1943, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645; *Frasca v. Howell*, 1950, 87 U.S. App. D.C. 52, 182 F.2d 703."

Again, in *Capital Transit Co. v. Howard*, 90 U.S. App. D.C. 359, 196 F.2d 593, this Court had occasion to discuss this subject matter and at page 361 of the opinion, the following was stated:

> "A second ground for reversal urged upon us is the action of the trial court in giving a supplementary charge[6] to the jury when after four hours of deliberations its foreman advised the court that the jurors were unable to agree.[7]
>
> "When the court indicated the purpose and nature of the supplementary charge it proposed to give to the jury, counsel for the Company objected that 'All of the evidence is in and any charge designed to coerce a settlement would not be in the interests of justice in a civil case.'[8] No further objection or specific request for clarification or elaboration was made below at any time. Appellant argues in this court, for the first time, that the disputed charge was given prematurely and failed to include certain specified safeguards. But since the Company failed to afford the trial court the opportunity of considering these objections at any time before the jury left the room, we are precluded by Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C.A. from considering them.[9] That rule says, in pertinent part:

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6, 7, 8 These footnotes are not included herein as they are considered immaterial.

9 We think, however, that the objections raised on appeal for the first time are without merit in any event.

> "'No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.'"

## CONCLUSION

WHEREFORE, it is respectfully submitted that this Court affirm the judgment in favor of Appellees, Rawlings Truck Line, Inc. and John E. Willis.

Respectfully submitted,

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BRIEF FOR APPELLEE, HARRY GOLDBERGER

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,648

DAVID M. WILLIAMS,

*Appellant,*

v.

RAWLINGS TRUCK LINE, INC.
JOHN EDWARD WILLIS

and

HARRY GOLDBERGER,

*Appellees.*

Appeal From The United States District Court
For The District of Columbia



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## QUESTION PRESENTED

Under the circumstances of this case, was the trial court correct in directing a verdict in favor of the appellee, Goldberger?

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DAVID M. WILLIAMS,

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---

Appeal From The United States District Court
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## BRIEF FOR APPELLEE, HARRY GOLDBERGER

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### COUNTER STATEMENT OF THE CASE

The appellant's "Statement of the Case" is not supported by the "Designated Record" filed by the appellant and contains inaccurate implications as to the appellee, Goldberger.

The appellant has placed a confusing record before this Court. His "Designation of Joint Appendix" contains only a reference to the "Complaint," which did not name Goldberger as a defendant.

Appellant's footnote No. 1 in his typewritten brief implies this appellee "received two extensions of time during which the case was kept from the ready calendar," whereas footnote No. 1 in his printed brief blames Rawlings and Willis for his delay in getting to trial. Actually the record of the U. S. District Court for the District of Columbia reflects that the extensions were for the benefit of appellees, Rawlings Truck Line, Inc. and John Edward Willis, and that a really serious delay in keeping this case from the ready calendar was the plaintiff's lack of diligence in prosecuting his claim. The trial court dismissed the case and the defendant Goldberger opposed its "reinstatement" on November 21, 1960.

The appellant's contention on page 7 of his printed brief that Goldberger's "registration was continued in the name of the defendant Goldberger with his permission because Joseph Rivera, although purchasing the automobile, *was unable to secure liability insurance"* is a false and misleading statement which is not supported by the record, is not factual, and can only be meant to mislead this Court.

The evidence was, and the record shows, that Goldberger only intended to allow Rivera to use Goldberger's license plates for the purpose of driving the automobile purchased by Rivera from Goldberger from New York City to the Marine Base (Camp Lejeune, North Carolina) where he was stationed. (J.A. 9 and 81) There was no evidence that either Goldberger or Rivera discussed or thought about the question of liability insurance when the automobile was sold to Rivera. The only evidence before the Court is that Rivera wanted to register the automobile in North Carolina where he was stationed at the time. (J.A. 9 and 81).

## SUMMARY OF ARGUMENT

The appellant does not argue, in his brief, that either Goldberger or Rivera were negligent as to Williams. Instead he asserts a false and misleading argument that Goldberger's acts were "to circumvent the insurance laws of New York" and then has the audacity to add "this is admitted by the appellee," whereas the truth is diametrically opposed to the appellant's contentions.

The appellee Goldberger contends that Goldberger was not the owner of the automobile and consequently could not be held liable for the actions of the operator Rivera, if and when the appellant decides to argue that Rivera was negligent.

## ARGUMENT

The defendant Goldberger *did not* allow the vehicle to be placed in operation in his own name in order to *circumvent the law of New York which required liability insurance* to be issued before the motor vehicle can be licensed under New York law, as argued by the appellant. The facts are that Goldberger "sold the car to Rivera, signed the back of the registration card and transferred the car to Joseph Rivera." (J.A. 9 and 81) Anyone requesting the registration on the car would have plainly seen that Rivera was the owner of the vehicle and that he had purchased same from Goldberger. There was no misrepresentation of ownership by Rivera when he was queried by Officer Nairn. He showed the registration card to Officer Nairn, who testified that "the rear of the certificate was a transfer notice with the handwritten name of Rivera and his address in Bronx, New York, also signed by Harry Goldberger." (J.A. 35) Rivera also exhibited to Officer Nairn "a receipt for a certain amount of money for the sale of a 1950 Mercury." (J.A. 36)

The defendant Goldberger *does not* admit in its trial brief that under the law of New York, Goldberger is liable. Goldberger has merely stated that if the accident had occurred in New York, the public policy of New York would estop him from denying ownership.

The essential point of law involved in this case concerning the defendant Harry Goldberger is the effect of his transfer of the subject automobile to Rivera. It is this defendant's contention that the points and authorities cited below will indicate (a) that it is clearly the public policy of the State of New York to estop a former owner from proving a sale where he has failed to remove the licenses plates and change the registration where the accident occurs in New York, (b) that no such public policy exists in the District of Columbia and that a former owner may prove the sale in the event of a subsequent accident, and (c) that since this accident occurred in the District of Columbia, District of Columbia law should apply.

The public policy for the State of New York was established by the case of *Shuba v. Greendonner* (1936), 271 N.Y. 189, 2 N.E. 2d 536. In the *Shuba* case the defendant, a resident of Connecticut, had a car registered in his own name to avoid the showing of financial responsibility required in order to register the car in the name of his minor son. The minor son had an accident in the State of New York and the father was sued as the registered owner. The issue was whether or not it was error to allow the defendant to show facts evidencing that his son was the real owner of the automobile. It was held that it was error and the case was reversed. The court held that New York law applied even though the car was owned and registered in Connecticut. The car was operated in New York by virtue of the statutes of both states. After a review of the statutes the court held that where the accident happened in New York it would be against the public policy of New York to allow the registered owner to deny ownership, *where the registration was for the purpose of avoiding the financial responsibility laws.*

Subsequent cases have been decided all over the country and almost all other jurisdictions decline to follow the New York law. In the recent case of *Gams v. Oberholtzer,* 310 P.2d 240, the Washington Court said:

"The New York courts have held that one who deliberately and falsely registers as owner of a vehicle, in violation of a statute, is estopped, on grounds of public policy, from denying ownership after the vehicle has been involved in an accident. *Shuba v. Greendonner*, 1936, 271 N.Y. 189, 2 N.E. 2d 536; *Elfeld v. Burkham Auto Renting Co.*, 1949, 299 N.Y. 336, 87 N.E. 2d 285, 13 ALR 2d 370. Similarly, the courts of that state hold that a dealer who has unlawfully allowed his license plates to remain on a vehicle which he has transferred to another, is estopped from denying ownership after the transferee negligently causes an accident. *Reese v. Reamore*, 1944, 292 N.Y. 292, 55 N.E. 2d 35; *Buono v. Stewart Motor Trucks*, 1944, 292 N.Y. 637, 55 N.E. 2d 508; *Switzer v. Aldrich*, 1954, 307 N.Y. 56, 120 N.E. 2d 159. Although the New York rule has been mentioned with approval in two recent cases, *Irvine v. Wilson*, 1955, 137 Cal. App. 2d Supp. 843, 289 P.2d 895; *Eggerding v. Bicknell*, 1955, 20 N.J. 106, 118 A.2d 820, we have found no case from any other jurisdiction which adopts it."

* * *

"It is difficult to justify the New York decisions under the doctrine of estoppel, which requires the party asserting the estoppel to show that he relied upon the other party's representation and that this reliance induced action or forbearance of a definite and substantial nature. *State v. Northwest Magnesite Co.*, 1947, 28 Wash. 2d 1, 182 P.2d 643. There is no indication that respondent in this case relied in any way upon appellant's representation of ownership, which was made not to him but to the state vehicle registration authorities."

In the District of Columbia it is equally clear that no public policy such as exists in New York is supported by our court. The case of *Burt v. Cordover* (D.C. Mun. App.)(1955), 117 A.2d 116, states the District of Columbia law. The Cordovers (a mother and son) agreed to sell their automobile to one Bennett. On August 21, 1952 they delivered the auto to Bennett along with an assignment of title that was not correct in every legal respect. Bennett collided the next day with Burt who is the plaintiff here. The court found sufficient facts to conclude that there

was a bona fide sale. The issue in the case was whether or not the Cordovers were the owners by reason of the fact that the car was still registered in their name. It was held that they were not the owners, that they had proven a bona fide sale. The court discusses the fact that in some states the contention of the plaintiffs would be upheld, that the Cordovers would be estopped from proving the sale but that this was not the law of the District of Columbia. The court stated:

> "While there is some authority in other states to the contrary, we believe that the better reasoned opinions on this question hold that where the seller's and buyer's minds have met upon all the essential terms of the contract of sale, and thereafter the automobile is delivered by the seller and accepted unconditionally by the buyer, such a transaction constituted a sale in which the title passes to the buyer even though there has not been a compliance with the registration law of the state."

The *Burt* case cites *Gasque v. Saidman* (D.C. Mun. App.), 44 A.2d 537. In the *Gasque* case the court states, at page 538, that it "has been settled in this jurisdiction by *Mason v. Automobile Finance Co.*, 73 App. D.C. 284, 121 F.2d 32," that liability as owner of a vehicle can not be fashioned from the single fact of ownership of the naked legal title because of registration. As pointed out by the District of Columbia Court of Appeals in Case No. 3456, entitled *Harrison Johnson, et al. v. Geneva Keyes,* on June 4, 1964:

> "Code Section 40-418(g) defines 'owner' as 'a person who holds the legal title of a vehicle.' Nevertheless, holding the registration certificate at the time of an accident is not conclusive as to ownership within the statutory meaning. *Mason v. Automobile Finance Co.*, 73 App. D.C. 284, 287, 121 F.2d 32, 35 (1941). It is necessary to look to the purpose of the statute, namely, 'to place the liability upon the person in a position immediately to allow or prevent the use of the vehicle and to do so by giving a lawful and effective consent or prohibition to its operation by others.' *Id.*, 73 App. D.C. at 287, 121 F.2d at 35. The object was not 'to impose liability upon one having a naked legal title with no immediate right of

> control.' *Ibid.* In the case at bar there was ample evidence for the finding that appellee had mere naked legal title to the automobile with no immediate right of control. Though the car was registered in her name, she did not have the power to allow or prevent its use. Under such circumstances she was not the owner of the automobile within the meaning of the Act. Compare *Burt v. Coraover,* D.C. Mun. App., 117 A.2d 116, 117 (1955)."

Thus it appears to be settled law in the District of Columbia that no such public policy as exists in New York is to be applied here.

It is the contention of this defendant that the District of Columbia law should be applied to this case because the accident happened in the District of Columbia. This is the normal law of conflicts of laws regarding torts. This law might also be regarded as a rule of evidence because the party is estopped to prove a certain fact and if it is a rule of evidence again the District of Columbia law should apply. The New York Court, in the *Shuba* case set out above, had no difficulty in applying New York law where the accident happened in New York even though the registration and ownership of the automobile was in Connecticut.

The appellant's argument is based on a fabricated statement, unsupported by the record, the evidence and the facts and should be held for nought. If the fabricated statement were factual, the appellant's position would be no better, as the application of District of Columbia law would warrant the trial court's ruling in favor of Goldberger.

## CONCLUSION

The trial court was correct in directing a verdict for the defendant Goldberger. He was not the owner of the automobile and Rivera's negligence, if any, would not be imputable to Goldberger. In any event, appellant does not argue that Rivera was negligent.

Respectfully submitted,

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APPELLANT'S REPLY BRIEF

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,648

DAVID M. WILLIAMS,

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Appeal from the United States District Court
for the District of Columbia

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## APPELLANT'S REPLY BRIEF

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**With Respect to Appellees Rawlings Truck Line, Inc., and John E. Willis:**

The major premise of these appellees is that despite the errors committed *perhaps* the plaintiff was not prejudiced. This theme first appears in the suggestion that the jury's verdict *might* have been the same if the jury had disregarded substantial, credible and, at times, overwhelming evidence favorable to the plaintiff. These appellees recognize at page 8

of their brief that "Just how the jury resolved that issue cannot be stated for their verdict was general" and then the argument proceeds that "*Perhaps* the jury was more impressed . . ." by other evidence and that *perhaps* the jury considered the *res gestae* testimony of Joseph Purcell even though objection to this evidence was repeatedly sustained; and that *perhaps* the jury accepted the arguments of counsel as an adequate substitute for the Court's instruction on the law (page 9) despite the Court's charge to the jury that "The closing arguments made by these attorneys this morning are not evidence in the case. These closing arguments are efforts by these men, who are admittedly advocates, to attempt to present their version of the evidence in the way that it is most favorable to the client that they represent", and reminding them again that "these arguments are not evidence and remember also that the recollections of the attorneys as to the evidence in the case are not binding upon you . . ." (JA 103). This premise, that *perhaps* the plaintiff was not prejudiced, appears again in the argument that *perhaps* the jury inferred from other circumstances the evidence of the *res gestae* statement repeatedly barred (p. 9, appellee Rawlings' brief) and that the jury *perhaps* relied upon "their own practical experience" (p. 7, Rawlings' brief) in the absence of pertinent traffic regulations favorable to the plaintiff, and that *perhaps* if the jury had sifted the Court's instruction with a fine-tooth comb enough particles might have been gathered together from which the plaintiff's theory could be pieced together, bearing in mind particularly that while the Court's charge was not in writing, the traffic regulations were asked for by the jury and only those admitted sent to the jury room in writing.

This appellee Rawlings does not state its major premise perhaps as clearly as we have here and we suggest that appellee would prefer *not* to have it stated *too* clearly, for this theory was not – is not – and we hope, never will be – the law of this jurisdiction. The cases decided here are quite clear that only where it is certain that the error could not have prejudiced the complaining party is it *no* grounds for reversal,

*Fowell v. Insurance Bldg.*, 32 A2 100 (Mun. Ct. App.). One who claims that an error was without prejudice must affirmatively show it to be so, *Smith v. Shoemaker*, 84 U.S. (17 Wall.) 630, 21 L Ed. 717, and the rule has been stated by this Court that error is harmless *only* where it is *certain* that the error could not have prejudiced the complaining party [emphasis supplied], *Chichester Chem. Co. v. U.S.*, 60 App. D.C. 134, 49 F.2d 516; and again this Court has stated that an error is presumed to be injurious where it is not shown whether it would or would not prejudice the party complaining, *Traver v. Smolik*, 43 App. D.C. 150. As early as the case of *Rouser v. Wash & G. R. Co.*, 13 App. D.C. 320, this Court made it quite clear that where there is a conflict in the evidence, a general verdict will be reversed where the error in instructions "may probably have produced, or contributed materially to that verdict," 13 App. D.C. 320, 327. It is worth noting that this language was used in *Rouser v. Wash & G. R. Co., supra*, and the Court *reversed*, stating at 13 App. D.C. 327:

> Notwithstanding this apparent preponderance of the evidence, there was, nevertheless, direct evidence on the other side which, if believed by the jury to contain the truth of the issue, would have entitled the plaintiff to their verdict thereon. In this condition, it would not have been within the province of the trial court to direct a particular verdict. Nor, under like circumstances, is it proper to sustain a judgment founded on a general verdict where there has been an error committed in the trial which may probably have produced, or contributed materially to that verdict.

The second point argued by appellee Rawlings is to the effect that the error was waived and they quote this portion of the record at page 15 of their brief:

> "The Court: Do you have any further requests?
>
> "Mr. Zitomer: No, your Honor.
>
> "The Court: Do you have any objections to the charge as given?
>
> "Mr. Zitomer: No, your Honor." (J.A. 114)

This quotation is lifted out of the middle of the page (JA 114). But only a few lines earlier, beginning at the bottom of page 113, the Court made the following announcement:

> "THE COURT: I will assume for the record at this point that any motions previously made by the defendants are renewed. The Court will take the same action on any motions which it has previously taken.
>
> "The Court will further assume for the record at this point that counsel renews all prior requests for prayers to the jury which were denied by the Court. The Court will assume for the record that counsel renews all previous objections previously voiced."

In the face of the Trial Judge's statement just quoted, it would have been bordering on contempt for counsel to reiterate all of the objections, motions and requests for prayers previously made as it was stated by this Court in *Winstead v. Hildenbrand*, 81 App. D.C. 368, "counsel for the plaintiff, having called the attention of the Court to his desire to have the jury instructed along the lines set out, and the Judge having twice refused such instructions, it would have been a vain and senseless thing [to re-submit it in another form]." At this point, it would have been the barest formality to again reiterate objections to the Court's view of the law for the trial court had repeatedly indicated its view by denying the plaintiff's requested prayers, by denying the *res gestae* statement, by denying the pertinent traffic regulations and by the Court's action in stating the converse of the plaintiff's theory of the case. The purpose of the exception required by the federal rules as a prerequisite to assignment of error as to the giving or failure to give instruction is to inform the Trial Judge of possible error so that he may have an opportunity to reconsider his rulings and, if necessary, correct them, *Harlem Taxicab Ass'n v. Nemesh*, 89 U.S. App. D.C. 123, 191 F.2d 459.

The principal issue pressed by the plaintiff in this case was clearly presented to the trial court time and time again in the forms already indicated and the Court just as clearly rejected that theory. This was not an oversight by the Trial Court, or a momentary lapse, but from all of the

rulings on the evidence, the traffic regulations and the offered prayers, especially in the light of the Court's expressed opinion to the jury after their verdict that he concurred in their verdict, indicated a pattern to reject the submission of the turn signal as an issue for the jury.

The appellee suggests, notwithstanding the fact that the Court deliberately and repeatedly rejected the plaintiff's theory, that somehow the Trial Court perhaps gave the plaintiff's theory in general language. This, in effect, suggests that the Trial Court, while deliberately rejecting it, perhaps inadvertently delivered it. Even if we were to consider that the plaintiff had waived objection to the Court's charge that the favored driver had the right to presume another motorist would yield the right of way, it still would not cure the basic error which stems from the Trial Court's refusal to instruct the jury on the *plaintiff's* theory of the case. The error in this respect was compounded by instructing with precision and particularity on the defendants' theory while ignoring the plaintiff's theory. The Court, having instructed so precisely in favor of the defendant with respect to his right of way, was obliged to present the plaintiff's theory as well, assuming the plaintiff's tendered instructions were proper. This Court has held in *Montgomery v. Virginia Stage Lines*, 89 U.S. App. D.C. 213, 191 F.2d 770, that "general instructions on negligence and proximate cost [become] insufficient in the face of requests that the Court be more specific on an important phase of the defendant's obligation . . .", 39 U.S. App. D.C. 213, 215. See also to same effect: *Metropolitan Life Ins. Co. v. Adams*, 37 A.2d 345; *Reese v. Wells*, 73 A.2d 899.

In summary, with respect to the appellee Rawlings Truck Line, Inc., and John E. Willis, we submit that the appellee has, in effect, conceded the several errors alleged. Their contention that the action of the Court, even though manifesting a deliberate intention to reject the plaintiff's theory, may not have prejudiced the plaintiff, is contrary to law and fundamental fairness. These errors were important enough to these appellees to have lead the Trial Court into error by pressing their objections. They

are just as important here and now. It is also significant that for the most part, appellee does not seriously attempt to defend the action of the Trial Court; and that this case does not represent a single omission or mis-step, or mistake of judgment, but represents a pattern on the part of appellees through their objections to keep the plaintiff's issue from the jury and upon their objections they were successful. We respectfully submit that they should not now be heard to argue that obvious error which they received the advantage of below, is now harmless.

**As to Appellee Goldberger:**

The appellee, Goldberger, states in his brief (page 3) that Goldberger "does not admit in its trial brief that under the law of New York Goldberger is liable," but on examination of the trial brief of Goldberger (JA 20), Goldberger cites *Shuba v. Greendonner* (1936), 271 N.Y. 189, 2 N.E. 2d 536, in which the highest court of New York held that the owner was liable and stated that it made no difference whether he was liable as a result of estoppel, or as a result of basic law established through public policy. Then the Court of Appeals goes on to describe the rules established by the legislature, including the requirement that certain classes of drivers submit evidence of financial responsibility. The appellee Goldberger's denial that the law of New York fixes liability on Goldberger is at odds with its own trial brief. The fact is that the law of New York as stated by that Court establishes liability regardless of what theory may be advanced. There is no doubt that the transfer of the automobile to Riviera with Goldberger's license plates remaining thereon with his consent would violate the law and regulations of New York and we are entitled to draw the reasonable inference that he allowed their use for that purpose. Goldberger's purpose in allowing the license plates to remain on the automobile was surely an inference for the jury and the refusal to submit this issue to the jury requires that the inferences from the evidence be drawn favorably to plaintiff. The basic issue in this case is as set out in our brief: The status of owner having been established in New

York, does the fact that the accident occurred in the District of Columbia change the status of the owner? We respectfully suggest on this point that the rule of conflict of laws should govern and that the law relating to contracts is governed by the law of the place of the contract. That under the law of New York, Goldberger is the owner.

Respectfully submitted,

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